

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

No. 23,544

750

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

RECEIVED

OCT 30 1969

CLERK OF THE UNITED
STATES COURT

REVEREND THOMAS B. ALLEN, *et al.*,
Appellants,

v.

WALTER J. HICKEL,
Secretary of the Interior, *et al.*,
Appellees.

APPENDIX

United States Court of Appeals
for the District of Columbia Circuit

FILED OCT 30 1969

Nathan J. Paulson
CLERK

(i)

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REVEREND THOMAS B. ALLEN
9001 Congressional Parkway
Potomac, Maryland

JAMES E. CURRY
3709 14th Street, N.W.
Washington, D. C.

EDWARD L. ERICSON
816 Easley Street
Silver Spring, Maryland

RABBI EUGENE J. LIPMAN
3512 Woodbine Street
Chevy Chase, Maryland

FATHER GEORGE MALZONE
1805 Kenyon Street, N.W.
Washington, D. C.,

Plaintiffs

v.

WALTER HICKEL
Secretary of the Interior
C between 18th & 19th Sts., N.W.
Washington, D.C.

NASH CASTRO
Regional Director
National Park Service
C between 18th & 19th Sts., N.W.
Washington, D. C.

WILLIAM FAILOR
Superintendent
National Capital Park Central
C between 18th & 19th Sts., N.W.
Washington, D. C.

Defendants

COMPLAINT
(Declaratory Relief and Injunction)

1. Plaintiffs are citizens of the United States;
defendants are residents of and/or are to be found in the District
of Columbia; this case raises questions under the laws and

Constitution of the United States; and the amount in controversy exceeds \$10,000.00, exclusive of interest and costs.

Jurisdiction of this Court in this action vests under the provisions of 28 U.S.C. §§1331, 2201 and 2202, and 11 D.C. Code §521.

a. Plaintiff Reverend Thomas B. Allen is a citizen of the United States and a resident of the State of Maryland.

b. Plaintiff James E. Curry is a citizen of the United States and a resident of the District of Columbia.

c. Plaintiff Edward L. Ericson is a citizen of the United States and a resident of the State of Maryland
Plaintiff

d./Rabbi Eugene J. Lipman is a citizen of the United States and a resident of the State of Maryland.

e. Plaintiff Father George Malzone is a citizen of the United States and a resident of the District of Columbia.

2. All of the plaintiffs are, and at all times relevant hereto have been, taxpayers of the United States.

Plaintiff Reverend Thomas B. Allen is an Episcopalian minister. Plaintiff James E. Curry is an atheist. Plaintiff Edward L. Ericson is Leader of the Washington Ethical Society and President of the American Ethical Union. Plaintiff Eugene J. Lipman is a rabbi. Plaintiff Father George Malzone is a Catholic priest.

3. Defendant Walter Hickel is Secretary of the Interior of the United States, Defendant Nash Castro is Regional Director of the National Park Service. Defendant William Failor is Superintendent of the National Capital Park Central.

4. For the past fifteen years, the defendants and their predecessors in office have expended substantial amounts of public tax funds and authorized the use of public tax supported grounds

for the erection and maintenance of a religious symbol in the form of a full-size creche on the Ellipse, as part of the Annual Pageant of Peace program, under an exclusive use permit from the Department of the Interior for approximately a three week period during the Christmas season.

5. In the Christmas season of 1968 and in prior years, the defendants, under the authority of 16 U.S.C. §§1-3 and 35 C.F.R. 50.7(1) have issued a permit giving exclusive use of the Ellipse area, adjacent roadways, and stage to the Christmas Pageant of Peace, Inc. for the purpose of conducting the annual Christmas Pageant of Peace program.

6. In addition to federal aid in the form of the use of federal tax supported land, the Christmas Pageant of Peace, Inc. is also allowed other forms of federal assistance, such as platforms, chairs, music stands, lighting and other equipment, together with the services of federal employees. Federal funds are also expended in setting up and taking down the displays, reconditioning the Ellipse area, police services and other assistance.

7. The Christmas Pageant of Peace is invested with a public character which makes it subject to the Bill of Rights. The Pageant is a national celebration closely associated with the White House and the President, and the Honorary Committee and the Program Committee, Executive Committee and various sub-committees are composed, in part, of high federal officials.

8. The form and concept of a creche is a religious symbol associated with and sacred to the Christian faith.

9. The display of a creche on federal land, with federal approval and assistance is religious proselytizing and support of religion by the government in violation of the First Amendment to the Constitution, and constitutes a potent infringe-

ment upon the plaintiffs' freedom of religion.

10. Plaintiffs are informed and therefore believe that the creche will again be erected during the Christmas season of 1969 and will continue as part of the Pageant of Peace program in the future, thereby causing irreparable injury and harm.

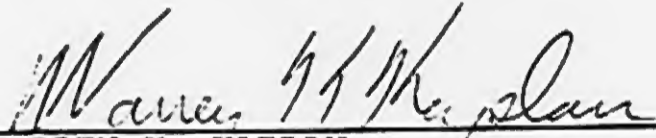
11. Plaintiffs have no adequate remedy at law in that their injury is not measurable in monetary damages and cannot be compensated for by an action at law.

WHEREFORE, plaintiffs pray as follows:

1. That the Court issue a declaratory judgment that the expenditure of federal tax funds or use of federal tax supported property for the erection of a creche or other religious symbol is in violation of the Establishment Clause of the First Amendment.

2. That the Court, after hearing, issue a preliminary injunction pending the final disposition of this suit, enjoining the defendants, their agents and employees, from authorizing or permitting the use of federal funds or federal lands for the erection or maintenance of a creche or other religious symbol during the Christmas season of 1969.

3. That the Court issue a permanent injunction enjoining the defendants, their agents and employees, from authorizing or permitting the use of federal funds or federal lands for the erection or maintenance of a creche or other religious symbol.


WARREN K. KAPLAN
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
Telephone: 298-8540
Attorney for Plaintiffs

OF COUNSEL:

RALPH J. TEMPLE, ESQ.
LAWRENCE SPEISER, ESQ.
AMERICAN CIVIL LIBERTIES UNION FUND
1424 16th Street, N.W.
Washington, D. C. 20006

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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C between 18th and 19th Streets, N.W.
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Regional Director
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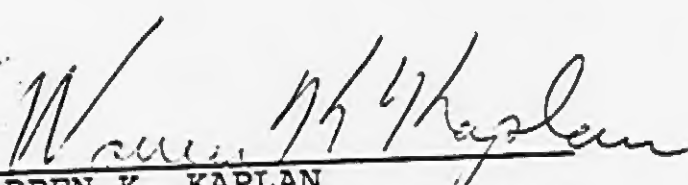
WILLIAM FAILOR
Superintendent
National Capital Park Central
C between 18th and 19th Streets, N.W.
Washington, D. C.,

Defendants

MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs, by their attorneys, move that the defendants and their agents, servants, officers and employees, be preliminarily enjoined, pending the final disposition of this suit,

from authorizing or permitting the use of federal funds or federal lands for the erection or maintenance of a creche or other religious symbol during the Christmas season of 1969, based upon the points and authorities and affidavits attached hereto.


WARREN K. KAPLAN
815 Connecticut Avenue, N.W.
Washington, D. C. 20006
Telephone: 298-8540
Attorney for Plaintiffs

OF COUNSEL:

RALPH J. TEMPLE, ESQ.
LAWRENCE SPEISER, ESQ.
AMERICAN CIVIL LIBERTIES UNION FUND
1424 16th Street, N.W.
Washington, D. C. 20036

AFFIDAVIT OF FATHER GEORGE W. MALZONE

My name is George W. Malzone. I am a Catholic priest of the Archdiocese of Washington.

I am, and have for many years been a taxpayer of the United States. I have been a resident of the District of Columbia for the past twelve years.

I have been informed and believe that the annual Christmas Pageant of Peace on the Ellipse, including the erection of the creche, will be repeated in the Christmas season of 1969.

The creche is a symbol sacred to Catholics, signifying a holy event, the nativity of Jesus Christ. As a Catholic priest, I consider the governmental sponsorship of the creche display on the Ellipse to be a profanation of this religious symbol which is central to my faith.

I believe that the governmental sponsorship of the creche, on public lands, constitutes an infringement on my freedom of religion, as well as an unwelcome and improper intrusion into and aid to religion in violation of the First Amendment to the Constitution of the United States.

George W. Malzone

Subscribed and sworn before me this 14th day of July, 1969.

Notary Public

Betty R. Allen

My Commission Expires July 31, 1970

AFFIDAVIT OF JAMES E. CURRY

JAMES E. CURRY being duly sworn, deposes and says:

1. I am JAMES E. CURRY of 3709 Fourteenth Street, N.W., Washington, D. C. I am an officer of the National Capital Humanist Association.

2. At all times material I have been and now am a taxpayer of the United States.

3. I have been informed and believe that the annual Christmas Pageant of Peace celebrations on the Ellipse will be repeated in the Christmas season of 1969, including the erection of a creche on the Ellipse.

4. The creche is a symbol ^{sacred} to Christians, signifying a holy event, the nativity of Jesus Christ. It is a symbol unacceptable to me and unacceptable by persons who do not believe in the divinity of Jesus Christ.

5. Monies raised by the federal government in the collection of taxes will be expended to support the erection and maintenance of such a creche on tax-supported Federal property during the Pageant of Peace.

6. The spirit of brotherhood and mutual respect for all religious beliefs can best flourish when the federal government remains neutral and does not favor one set of beliefs by such means as is contemplated by the Pageant of Peace Program. Such governmental support can act only to release rivalries between different religious and non-religious groups.

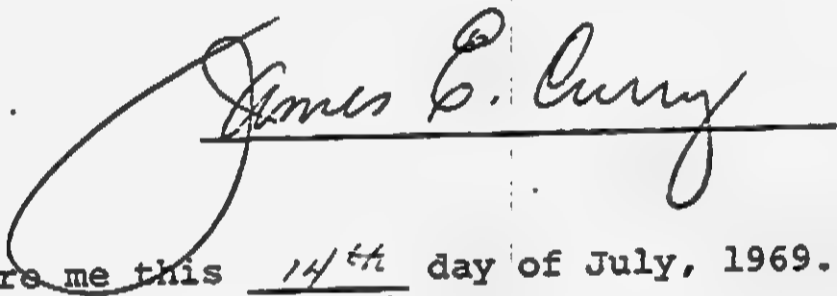
JEC

7. Governmental support of a particular religious belief (as is manifested in the creche) will place pressure on other religious and non-religious groups to conform to the set of beliefs which is given such support.

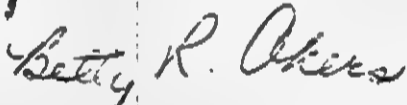
8. Such government support will limit the freedom and independence of other groups and the free exercise of religion of all persons.

9. Such governmental support will limit the religious independence of the group so chosen, and will act as a control on the beliefs of its members.

10. If the government is allowed to favor one religion today, it can favor another tomorrow. Therefore, the independence of all groups, religious and non-religious, and the free exercise of belief of all persons is threatened.


James E. Curry

Subscribed and sworn before me this 14th day of July, 1969.


Betty R. Oakes

My Commission Expires July 31, 1971

Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REVEREND THOMAS B. ALLEN
9001 Congressional Parkway
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WILLIAM FAILOR
Superintendent
National Capital Park Central
C between 18th and 19th Streets, N.W.
Washington, D. C.,

Defendants

AFFIDAVIT

My name is Thomas B. Allen. I reside at 9001 Congressional Parkway, Potomac, Maryland. I have lived in the Washington metropolitan area of the past twenty years.

For the past several years, the National Park Service has given a permit for the Christmas Pageant of Peace display on

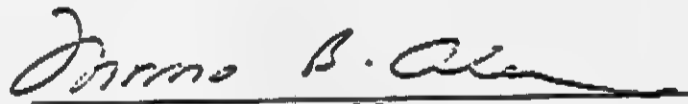
the Ellipse. The Pageant includes the erection of a full-sized creche, the Bethlehem manger scene of the Christ child.

I have been informed and believe that the Pageant, besides using federal lands, receives substantial financial assistance from the National Park Service in the form of the time and services of federal employees in erection, maintenance and supervision, police services, lighting, chairs, platforms, etc. and other facilities.

I have been further informed that the National Park Service plans to continue the Christmas Pageant of Peace program in all its essential aspects during the coming Christmas season.

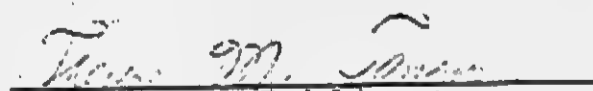
As an Episcopalian minister, I feel that governmental espousal of religion by supporting and endorsing a symbol of the Christian religion is an improper and unconstitutional use of federal tax moneys. Such governmental proselytizing cannot help but have a coercive and intimidating effect upon non-Christians, and therefore directly interferes with their freedom of religion.

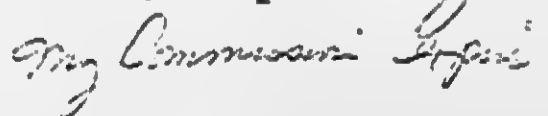
I regard the use of federal land and moneys to support this religious symbol as an ominous precedent which can lead in time to more serious violations. The American constitutional tradition of separation of church and state requires the strict neutrality of the state on matters of belief, and I believe that the way for the state to observe that neutrality is to refrain from any gesture of favoritism on matters of religious practice.


Thomas B. Allen

DISTRICT OF COLUMBIA, SS:

Subscribed and Sworn to before me this 11th day of July, 1969.


Notary Public

 12-31-70

Defendants

Civil Action No. 1951-69

Plaintiffs, by their attorneys, move that summary judgment be entered, permanently enjoining the defendants and their agents, servants, officers and employees, from authorizing or permitting the use of federal funds or federal lands for the erection or maintenance of a creche or other religious symbol on the Ellipse south of the White House during the Christmas Season of 1969, or at any other time, and as grounds therefor, plaintiffs say that there is no genuine dispute of fact as to any material issue.

RALPH J. TEMPLE
AMERICAN CIVIL LIBERTIES UNION FUND
1424 16th Street, N.W.
Washington, D. C. 20036

Plaintiffs refer to the Statement of Points and Authorities and Affidavits previously filed in support of

plaintiffs' Motion for Preliminary Injunction.

Certificate of Service

I hereby certify that a copy of the foregoing Motion for Summary Judgment with Points and Authorities was mailed, postage prepaid, this 12th day of September, 1969, to Gil Zimmerman, Esq., Assistant U.S. Attorney, United States Department of Justice, Washington, D.C. 20001.

15/
Warren K. Kaplan

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REVEREND THOMAS B. ALLEN,
et al.,

Plaintiffs,

v.

WALTER J. HICKEL,
Secretary of the Interior,
et al.,

Defendants.

Civil Action No. 1951-69

DEFENDANTS'
MOTION TO DISMISS, OR, ALTERNATIVELY,
FOR SUMMARY JUDGMENT; AND OPPOSITION
TO MOTION FOR PRELIMINARY INJUNCTION

Defendants by their attorney, the United States Attorney
for the District of Columbia, hereby --

- (1) Move the Court to dismiss the action (a) for lack of jurisdiction, in that plaintiffs lack standing to sue, and (b) for failure of the complaint to state a claim on which relief can be granted;
- (2) Alternatively, move the Court to grant summary judgment in their favor, on the ground that there is no genuine issue as to any material fact, and they are entitled to judgment as a matter of law; and
- (3) Oppose plaintiffs' motion for preliminary injunction.

Incorporated herein (marked Government Exhibit No. 1) is the affidavit of Russell E. Dickenson, Associate Regional Director, National Capital Region, National Park Service, Department of the Interior (with Attachments A-H).

Defendants traverse -- for all purposes -- plaintiffs' claim (if it be to the effect) that substantial Federal funds will be expended for the Creche display as part of the 1969 Christmas Pageant of Peace event sponsored by the Christmas Pageant of

Peace, Inc.; this claim is categorically denied in the affidavit of the National Capital Region Associate Regional Director (Government Exhibit No. 1).

In support hereof, a statement of material facts and memorandum of points and authorities are submitted.

/s/

THOMAS A. FLANNERY
United States Attorney

/s/

JOSEPH M. HANNON
Assistant United States Attorney

/s/

GIL ZIMMERMAN
Assistant United States Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of the foregoing Defendants' Motion to Dismiss, or, Alternatively, for Summary Judgment; and Opposition to Motion for Preliminary Injunction, together with statement of material facts and memorandum of points and authorities in support thereof, has been made upon plaintiffs by hand-delivering a copy thereof (with Govt. Ex. 1 and Attachments A-H) to their attorney, Warren K. Kaplan, Esq., 815 Connecticut Avenue, N.W., Washington, D.C. 20006, and by mailing a copy thereof to their co-counsel Ralph J. Temple, Esq. and Lawrence Speiser, Esq., American Civil Liberties Union and Fund, 1424 - 16th Street, N.W., Washington, D.C. 20036, this _____ day of September, 1969.

/s/ -

GIL ZIMMERMAN
Assistant United States Attorney

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REVEREND THOMAS B. ALLEN,
et al.,

Plaintiffs,

v.

WALTER J. HICKEL,
Secretary of the Interior,
et al.,

Defendants.

Civil Action No. 1951-69

DEFENDANTS'
STATEMENT OF MATERIAL FACTS

1. Plaintiffs purport to sue here qua taxpayers of the United States; they also claim injury to their "freedom of religion."

2-9. Incorporated herein by reference are the averments set forth in paragraphs 2-9 of the affidavit filed as Government Exhibit No. 1.

/s/

THOMAS A. FLANNERY
United States Attorney

/s/

JOSEPH M. HANNON
Assistant United States Attorney

/s/

GIL ZILBERMAN
Assistant United States Attorney

EXCERPT FROM
POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S
MOTION TO DISMISS OR FOR SUMMARY JUDGMENT,
FILED SEPTEMBER 18, 1969 - p. 8

history, including all of its secular, cultural and religious heritage aspects. Or they may remain entirely away, if they choose not to attend the Christmas Pageant event. See Zorach v. Clauson, 343 U.S. 306, 311-312 (1952).

Thus, plaintiffs patently fail to meet the traditional "legal injury" test for standing to sue, apart from their status qua Federal taxpayers. See the discussion in the leading case of Alabama Power Co. v. Ickes, 302 U.S. 464, 479-481 (1938).

II. Plaintiffs' claim that the First Amendment's
Establishment-of-Religion Clause has been
violated here is without substance

Prescinding [sic] from the threshold jurisdictional issue here, we turn to consider plaintiffs' claim on the merits. They assert that the National Park Service's cooperation with the Christmas Pageant of Peace, Inc., in its 1969 production of the Christmas Pageant of Peace event, violates the First Amendment's Establishment-of-Religion Clause.² And they focus their attack exclusively upon the Christmas Pageant of Peace, Inc., inclusion in its Christmas Pageant of a Creche display to represent the religious heritage aspect of our celebration of Christmas as a national holiday. (emph. added)

This attack necessarily fails. The pertinent Supreme Court decisions make it clear that the First Amendment's * * *

² If plaintiffs mean to raise any issue here as to infringement of their "free exercise" of religion rights under the First Amendment, Zorach v. Clauson, supra, 343 U.S. at 311-312, is wholly dispositive. We do not understand that they mean to raise any such issue by adverting to their personal "freedom of religion." Their complaint seeks declaratory judgment relief here solely as to a claimed violation of the "Establishment-of-Religion" Clause in the First Amendment.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REVEREND THOMAS B. ALLEN,
JAMES E. CURREY, et al.,

Plaintiffs,

v.

Civil Action No. 1951-69

WALTER J. HICKEL
Secretary of the Interior
NASH CASTRO
Regional Director
National Park Service, et al.,

Defendants.

A F F I D A V I T

CITY OF WASHINGTON)
DISTRICT OF COLUMBIA) ss

Russell E. Dickenson, being duly sworn, deposes and says:

1. I am the Associate Regional Director, National Capital Region, National Park Service, Department of the Interior, and have held this position since January 14, 1968. In my present capacity, I am the delegate of the Regional Director relative to management of all park activities in the National Capital Region. In the absence of the Regional Director, I serve as Acting Regional Director. Theodore Swen, who is presently Regional Director, is currently absent from Washington, D. C., on official business.

2. The "Christmas Pageant of Peace" is officially recognized as an annual national celebration event. It takes place in the Nation's Capital on the Ellipse (President's Park) area during the period from about December 10 through the following January 2. The National Park Service has long cooperated in the annual production of this national celebration event.

(a) This Christmas Pageant has traditionally been closely associated with the White House and the President. Its principal attraction is the National Christmas Tree. The lighting of this tree is customarily done by our President. This National-Christmas-Tree-lighting custom dates back to 1924, when it was initiated by President Calvin Coolidge. The custom has continued during the administrations of Herbert Hoover, Franklin Roosevelt, Harry Truman, Dwight Eisenhower, John F. Kennedy and Lyndon Johnson.

(b) While the Christmas Pageant is officially recognized as an annual national celebration event, it has been privately sponsored and produced since 1954 by a non-profit, non-sectarian, non-partisan civic organization, the Christmas Pageant of Peace, Inc. The event is supported by voluntary contributions of individuals and organizations.

(c) Each annual Christmas Pageant event is produced with the cooperation of all segments of our society, including business, labor and social organizations, churches, schools and colleges, States and American cities, and the local and Federal governments. Even foreign embassies and legations cooperate. (A copy of the 1968 Christmas Pageant of Peace program is annexed as Attachment A.)

(d) The Christmas Pageant celebrates our observance of Christmas as a national legal holiday. In this regard, it encompasses all the traditions in our national history incident to celebration of the Christmas holiday season, including all of its secular, cultural and religious heritage aspects. In addition to the beautifully decorated and illuminated National Christmas Tree, there are 57 small decorated and illuminated Christmas trees, the Yule log, the reindeer, and a Creche, which is an

illuminated life-sized nativity scene. An illuminated stage is also erected. On this stage, musical and ceremonial programs traditionally associated with the Christmas holiday season take place throughout the three weeks of the Christmas Pageant.

(e) Additionally, since 1954, the Christmas Pageant event has been celebrated as a visible expression of our Nation's desire for "Peace on Earth, Good Will Towards Men," a traditional Christmas theme. In this aspect, it evinces this Nation's aspiration to foster understanding and friendship between all the nations of the world and the American people. (Attachment A.)

3. The National Park Service views its official cooperation with the Christmas Pageant for Peace, Inc., in the production of the Christmas Pageant, and in making the Ellipse (President's Park) area available to that organization, on its request, in connection with that event, as proper National Park Service functions. We similarly extend our cooperation to other private organizations which sponsor the production of officially recognized national celebration events, such as the Cherry Blossom Festival, the President's Cup Regatta, the National Independence (Fourth of July) Celebration. We likewise cooperate in other National-Capital-Park-connected events in the Nation's Capital. The officially recognized national celebration events in particular attract to the National Capital Park areas thousands of visitors who are thus enabled to enjoy those park areas in the very recreational aspects to which Congress has directed their primary dedication. See 16 U.S.C. §§1, 20-20g; 36 C.F.R. §50.19(d)(2).

4. The Ellipse (President's Park) area, where the Christmas Pageant event takes place, is Federal park land under National Capital Park Region jurisdiction. In previous years, under permits issued pursuant to 36 C.F.R. §50.19, the National

Park Service has granted the Christmas Pageant of Peace, Inc. exclusive use of the Ellipse park area, including adjacent roadways, for production of the Christmas Pageant during approximately three weeks of the Christmas season. For this year's Christmas Pageant, the National Park Service has authorized the Christmas Pageant of Peace, Inc., by letter to have exclusive use of the Ellipse park area for its production of the Christmas Pageant event. (Attachment B1, B2.)

5. The Creche is exclusively the property of the Christmas Pageant of Peace, Inc. It is annually erected, dismantled and stored for that organization by Hargrove Displays, Inc. (Attachment C.) Prior to the 1968 Christmas Pageant, the National Park Service Regional Director discussed the matter with both representatives of Christmas Pageant of Peace, Inc., and representatives of the American Civil Liberties Union. In order to eliminate all future question in the matter, the Regional Director then determined that there would be "no National Park Service involvement in the storage, maintenance, repair, erection or disassemblment of the Creche as part of the Pageant." This determination was confirmed by letter dated November 22, 1968 to the President, Christmas Pageant of Peace, Inc. This letter stated that thereafter all such activities in respect of the Creche would be entirely "the responsibility of the non-Federal membership of the Pageant of Peace Committee." (Attachments D-F.)

6. Permanent underground electrical feeder lines have been installed to supply electricity from the main power station

to the area of the Christmas Pageant. All electricity used by the Christmas Pageant event, including that used in illuminating the Creche, is borne by the Christmas Pageant for Peace, Inc. (Attachment G1, G2.)

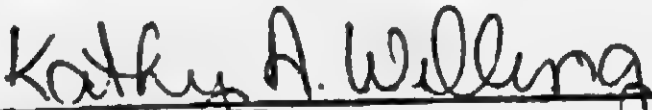
7. The National Park Service, pursuant to the policy guidelines stated in 36 C.F.R. §50.19(d)(2), provides assistance to the Christmas Pageant event as a whole, in the form of digging the pit for the Yule log, setting up platforms, boardwalks, the deer pen and building, the National Christmas Tree and the other smaller trees; doing electrical, painting, and carpentry work; performing horticultural activities; maintaining the area; collecting trash; and operating all activities from 4:00 p.m. to 1:00 a.m. daily. The total costs of labor, materials, and equipment for the 1968 Christmas Pageant event were \$72,789.78.

(Exhibit H1, H2.) Since these costs concern the Christmas Pageant event as a whole, the National Park Service considers that these expenditures would be spent for the event, irrespective whether the Creche display is or is not part of it.

9. It is the National Park Service understanding that the Christmas Pageant of Peace, Inc., plans again to include the Creche display as part of the 1969 Christmas Pageant. As was the case in the previous year, no assistance will be provided by the National Park Service to the Creche display as such. The Christmas Pageant of Peace, Inc., will bear the entire responsibility for that display during the forthcoming Christmas Pageant event.


RUSSELL E. DICKENSON

Subscribed and sworn to before me
this 16th day of September, 1969


NOTARY PUBLIC
My Commission Expires May 14, 1974

*The 1968
Christmas Pageant of Peace*

*The President's Park
Washington, D. C.*

Allen v. Hickel
Civil Action No. 1951-69
Attachment A to Affidavit of
Russell E. Dickenson

Government Exhibit 1



The Story of the Christmas Pageant of Peace

The Christmas Season in the Nation's Capital centers around the Pageant of Peace, which had its beginning when a group of leaders in the Washington Community established the Pageant as a visible expression of this Nation's desire for "Peace on Earth, To Men of Goodwill." This theme is expressed by the Pageant and is highlighted by the lighting of the National Christmas Tree by the President of the United States.

The Pageant has been repeated every year for the past fourteen years, and now, as it opens its fifteenth annual celebration, the Pageant of Peace is firmly established as a national tradition, a visible expression of this Nation's aspirations and desires to foster understanding and friendship between the nations of the world and the American People.

The principal attraction of the annual celebration is the National Christmas Tree, given each year by a different state. This year's tree, a gift from the people of Utah, is a seventy-four foot tall Engelmann Spruce. General Electric Company and its engineers design and light this beautiful tribute to the yule season.

The custom of lighting a National Christmas Tree dates back to 1923 when President Calvin Coolidge walked out on the south lawn of the White House to light a tree from his native state of Vermont. The custom continued during the administrations of Herbert Hoover, Franklin Roosevelt, Harry Truman, Dwight Eisenhower, John F. Kennedy and President Lyndon B. Johnson.

President Eisenhower lit the first tree from the Christmas Pageant of Peace in 1954. This tree was given by the citizens of the State of Michigan. Since then trees have come from South Dakota, New Mexico, Minnesota, Montana, Maine, Oregon, and West Virginia, among others. Last year the tree came from the State of Vermont.

Lining the "Pathway to Peace" leading up to the main tree are the 57 smaller trees, a gift from the Peabody Coal Company and the American Mining Congress. The trees are all 12 feet tall, each one representing one of the fifty states or seven territories. The spirit of Christmas is further exemplified by the other functions of the Pageant that are grouped around the base of the National Tree.

The spiritual meaning of Christmas is offered in the form of a life-sized Nativity Scene which is floodlighted at night. The festive, happy meaning of Christmas is represented by eight reindeer who normally live at the Washington Zoological Park. They make their annual trip to the corral near the brilliantly lighted tree to give the children a close look at Santa's reindeer. And the traditional Yule Log burns day and night throughout the Pageant, offering warmth to those taking part in the Pageant festivities.

The Pageant of Peace will last until January 1, 1959. At that time the lights will be turned off and the fifteenth annual Pageant of Peace will come to an end.

The Christmas Pageant of Peace would not be possible without the cooperation of Churches and Church groups, schools and Universities, embassies and legations, states and cities of the Union, the local and Federal Government, business, labor and social organizations. Added to this is the host of individuals who have given their support both materially and in time and effort.

The officers of the Christmas Pageant of Peace, a non-sectarian, non-profit civic organization, express their appreciation to all these groups and persons.

The 1968 Christmas Pageant of Peace

Lighting of the National Christmas Tree and Opening Ceremonies

Christmas Selections.....United States Marine Band
Lt. Col. Albert F. Schoepper, Director

Introduction.....Mr. Edward R. Carr
President, Pageant of Peace

Invocation.....Patrick Cardinal O'Boyle
Archbishop, Catholic Diocese of Washington

Introduction.....Mr. Carr

Presentation.....Mr. John M. Dalton
Chairman, Pageant of Peace

Christmas Selections.....United States Marine Band

The Virginia Tech Varsity Glee Club.....Stanley G. Kingma
Director

Virginia Polytechnic Institute, Blacksburg, Virginia

We need a little Christmas.....Jerry Herman

The Sleigh.....Richard Kountz

Christmas Selections.....United States Marine Band

The Arrival of President & Mrs. Lyndon B. Johnson

Introduction.....Mr. Carr

Remarks.....John M. Dalton

Lighting of the National Christmas Tree (Continued)

Presentation.....Honorable Frank E. Moss
Senator, State of Utah

Introduction of the Honorable Stewart L. Udall
Secretary of the Interior.....Mr. Dalton

Remarks.....Secretary Udall

Prayer for Peace.....Reverend John T. Tavlarides
Dean, St. Sophia Greek Orthodox Cathedral

The Virginia Tech Varsity Glee Club.....Stanley G. Kingma
Prayer from "Lohengrin".....Richard Wagner
Winter Song.....Frederick Bullard

Greetings from the Citizens of
Washington, D.C.....The Honorable Walter E. Washington
Mayor-Commissioner,
The District of Columbia

Greetings to President & Mrs. Johnson....Sue Walsh
Senior Girl Scout
Council of Washington, D.C.
David T. Evans, Jr.
Boy Scouts of America

Introduction of President Johnson.....Secretary Udall

The President's Christmas Greeting to the World

The Lighting of the National Christmas Tree

Benediction.....Right Reverend William T. Creighton
Bishop, Episcopal Diocese of Washington

The National Anthem.....United States Marine Band

A Concert of Christmas Music

"Night of the Miracle"

presented by

THE MILITARY DISTRICT OF WASHINGTON,
UNITED STATES ARMY

featuring

THE UNITED STATES ARMY BAND

and

THE UNITED STATES ARMY CHORUS
Lt. Col. Samuel Loboda, Director

Constitution Hall

Washington, D. C.

Saturday, December 14, 1968 — 8:30 P.M.

THE CIVIC OPERA ASSOCIATION

presents

THE WIZARD OF OZ

sponsored by

The D.C. Recreation Department

Roosevelt High School Auditorium

3:00 P.M.

Saturday, December 14 and Sunday, December 15

Open to the Public. Admission Free

Pan American Union Display

17th and Constitution Avenue, N. W.

In keeping with the Christmas Traditions of the Latin American Countries, the Pan American Union will display a life-size Nativity scene and program, recorded Latin American Christmas Music December 16 through January 6.

The Pageant of Peace, 1968

The 1968 National Christmas Tree comes from the Uinta National Forest near Heber City, Utah, as a gift of the people of Utah. The tree, a 74 foot tall Engelmann Spruce (*Picea engelmanni*) has been growing in the forests of Utah for over 115 years. The tree was cut and loaded on a special truck and transferred to several trains for shipment into the Nation's Capital.

Upon arrival in Washington, D. C., the National Tree is placed in a prepared location with the help of giant mobile cranes. The tree is stabilized with cables and scaffolding is assembled around the tree so that decorations may begin at the top and work down.

A few days after the arrival of the National Tree, fifty-seven 12 foot tall pine trees, the gift of the Peabody Coal Company and the American Mining Congress will be brought to the Ellipse to line the Pathway to Peace which leads to the National Tree. These trees will be decorated in the same manner as the National Tree and will represent the states and territories of the United States.

Once the trees have been placed, the job has just begun. The General Electric Company has donated the fifteen thousand lights which illuminate the trees and have drawn up the design and installation of the lights. Due to the enormous amount of power necessary for the display, the Potomac Electric Power Company is contracted to bring in special circuits for the Pageant.

Santa's Reindeer were brought from the National Zoological Park; the remnants of the 1967 National Tree were brought to the grounds to serve as the Yule Log; and the Pathway, Nativity Scene and the stage were placed in position.

When President Johnson throws the switch to light the National Tree, the hours spent by hundreds of people who arranged for the seating, performers, and the multitude of details necessary to produce the Pageant of Peace will be well rewarded by the hundreds of delighted visitors who will see and enjoy the PAGEANT OF PEACE, 1968.

1968 Christmas Pageant of Peace

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Reverend John T. Tavlarides
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Potomac Electric Power Company

The Christmas Pageant of Peace

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Chairman: Mrs. Nancy Poore Tufts

Pageant Festival:

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John Bessor

Pathway of Peace:

Chairman: J. Allen Overton, Jr.
Ray Briscuso

Reception:

Chairman: Luis F. Corea
Francis Kane
John A. Logan
Harry L. Merrick
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Seating:

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D.C. Recreation Department
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D.C. Recreation Department

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Hargrove Displays
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Most Reverend John S. Spence, D.D.,
Vicar General, Archdiocese of Wash-
ington

Laurence I. Wood
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MISSOURI Honorable Warren E. Hearnes	WYOMING Honorable Stanley Hathaway

Music for the 1968 Christmas Pageant of Peace

Pageant Prelude—U.S. Army Band and Chorus
Constitution Hall — December 14

OPENING CEREMONY — MONDAY, DECEMBER 16
4:30 to 5:30 P.M.

Music by United States Marine Band

Choral Music by

THE VIRGINIA TECH VARSITY GLEE CLUB
VIRGINIA POLYTECHNIC INSTITUTE

Stanley G. Kingma, Director

MONDAY, DECEMBER 16:

- 4:30 PM—The United States Marine Band
The Virginia Tech Varsity Glee
Club, Virginia Polytechnic Insti-
tute, Blacksburg, Virginia, Stan-
ley G. Kingma, Director
- 6:00 PM—Winston Churchill High School
Chorus, Potomac, Maryland, Do-
lores McGraw, Director
- 7:00 PM—Cabbage Handbell Ringers and
Wesley Boy Choir, Wesley Meth-
odist Church, Dover, Delaware,
Thomas C. Flynn, Director
- 8:00 PM—Emanuel Bell Ringers, Emanuel
Lutheran Church, Napoleon, Ohio
Ronald Schink, Director
- 8:30 PM—Wheaton High School Choir,
Wheaton, Maryland, Jack Ta-
lamo, Director
- 9:00 PM—Prayer for Peace

TUESDAY, DECEMBER 17:

- 3:00 PM—Broome Junior High School
Chorus, Rockville, Md., Linda
Wilberger, Director
- 3:30 PM—Bannaker Junior High School
Glee Club, Washington D. C.,
Samuel Bonds, Director
- 4:00 PM—Langley Junior High School
Singers, Marthalia Garrett &
Kathleen Burke, Directors, Wash-
ington, D. C.
- 4:30 PM—Greenbelt Junior High School
Mixed Chorus Greenbelt, Mary-
land, Mrs. Leon Neillanbach,
Director
- 5:00 PM—Wakefield Senior High School
Choirs, Arlington, Virginia, Larry
D. Feathers, Director
- 6:00 PM—Kensington Junior High School
Kensington, Maryland, Sandra
Keir, Director

- 7:00 PM—La Reine High School Concert
Choir, Suitland, Maryland, Sis-
ter M. Alexine, Director
- 7:30 PM—Sligo Junior High School Chorus,
Silver Spring, Maryland, John
Reece, William Neal, Directors
- 8:00 PM—John F. Kennedy Senior High
Band, Silver Spring, Maryland,
Al Salazar, Director
- 8:30 PM—Emanuel Baptist Church Choir,
Manassas, Virginia, Ellen Mid-
gette, Director, The Rev. Charles
Gibson, Pastor
- 9:00 PM—Prayer for Peace

WEDNESDAY, DECEMBER 18:

- 3:00 PM—Girls Choir of Sacred Heart
Academy, Washington, D. C.,
Robert W. Brimmer, Director
- 3:30 PM—Calvin Coolidge Senior High
Choir, Washington, D. C. Geral-
dine Slaughter, Director
- 4:00 PM—Browne Junior High School Band,
Washington, D. C., Wilbur Bel-
lamy, Director
- 5:00 PM—Episcopal High School Choir,
Alexandria, Va., Mary Camm
Adams, Director
- 5:30 PM—Langley Senior High School
Mixed Chorus and Girls Chorus,
McLean, Virginia, Mrs. Malcolm
Cook, Director
- 6:00 PM—Chesapeake & Potomac Tele-
phone Co. Glee Club, William
A. Ball, Director
- 6:30 PM—Madrigal Singers and Charm-
ettes, Groveton Senior High
School, Alexandria, Va., David
Aiken, Director
- 7:00 PM—Metropolitan Baptist Church
Senior Choir, Washington, D. C.,
Drusilla Boddie, Director, Earl
Hargroves, Accompanist

- 8:00 PM—Samuel Ogle Junior High School Chorus, Bowie, Maryland, Barbara B. Evans, Director
- 8:30 PM—John F. Kennedy Senior High School Chorus, Silver Spring, Maryland, Don Springer, Director
- 9:00 PM—Belair Woman's Chorus, Bowie, Maryland, Mrs. Barry Pickus, Director
- 9:30 PM—Prayer for Peace

THURSDAY, DECEMBER 19:

- 3:00 PM—Glee Club of the Alice Deal Junior High School, Washington, D. C., Jean Lauderdale, Director
- 4:00 PM—Immaculata Preparatory School Glee Club, Washington, D. C., Sister Marie Xavier, Director
- 4:30 PM—Madrigal Singers & The A Capella Girls, Falls Church, Senior High School, Falls Church, Virginia, Jerry Holloway, Director
- 5:00 PM—Walt Whitman Senior High School School A Capella Choir, Bethesda, Md., George Messick, Director
- 5:30 PM—Surrattsville Concert Choir and Surratt Singers, Clinton, Maryland, Sandy Willetts, Director
- 6:00 PM—Childrens Choir of Christ Episcopal Church, Kensington, Maryland, Emily Pearse, Director
- 6:30 PM—Groveton Senior High School Symphonic Chorus, Alexandria, Virginia, David Aiken, Director
- 7:00 PM—St. Mary's Elementary School Glee Club, Landover, Maryland, Avis Bokal, Director
- 7:30 PM—Benjamin Stoddert Junior High Chorus Marlow Heights, Maryland, Jean Shaw, Director
- 8:00 PM—Thomas Jefferson Senior High School Madrigal Singers, Alexandria, Virginia, James Getty, Director
- 8:30 PM—Concert Choir of the Parkdale Senior High School, Riverdale, Maryland, Dale Nonnemacher, Director
- 9:00 PM—Prayer for Peace

FRIDAY, DECEMBER 20:

- 3:00 PM—Belair Junior High School Band, Bowie, Md., Clemmie Weems, Director
- 3:30 PM—Choral and Instrumental Ensemble, Morningside Elementary School, Morningside, Maryland, MaryLou Conyers, John Phillips, Directors

- 4:00 PM—Glee Club, Academy of Our Lady, Washington, D. C., Sister John Leonard, Director
- 4:30 PM—St. Jane de Chantal Junior High School Chorus, Bethesda, Maryland, Sister Frances Stefano, S.C., Director
- 5:00 PM—Laurel Senior High School Glee Club, Laurel, Maryland, Maxine Shanks, Director
- 5:30 PM—Chapel Choir and Chorale, Talbot Park Baptist Church, Norfolk, Virginia, Will Address, Director
- 6:30 PM—Bowie Senior High School Camerata, Bowie, Maryland, Gordon Gustin, Director
- 7:00 PM—Langley Senior High School Concert Choir and Madrigal Singers, McLean, Virginia, Mrs. Malcolm Cook, Director
- 8:00 PM—Fair View Christian Church Youth Choir, Lynchburg, Virginia, James Anderson, Director
- 9:00 PM—Prayer for Peace

SATURDAY, DECEMBER 21:

- 3:00 PM—St. John's High School Band, Washington, D. C., Lee Mason, Director
- 3:30 PM—Berkeley Springs Chorale, Berkeley Springs, West Virginia; The Heritage Singers, Washington, D. C., Faye Finly Shaw, Director
- 4:30 PM—The Peppermint Pipers—Benjamin Stoddert JHS, Marlow Hgts., Maryland, Jean Shaw, Director
- 5:00 PM—Westover Carol Choir and Instrumental Ensemble, Westover Baptist Church, Arlington, Virginia, Jean Sallee, Director
- 6:00 PM—St. Ambrose Young Peoples Choir, St. Ambrose Elementary School, Cheverley, Maryland, Sister Mary, Director
- 6:30 PM—Chapel Choir, National City Christian Church, Washington, D. C., Lawrence Schreiber, Dir.
- 7:00 PM—Fairlington Presbyterian Church Choir and Handbell Ringers, Alexandria, Virginia, Robert Chandless, Director
- 7:30 PM—Columbia Baptist Church Junior Choir, Falls Church, Virginia, Cantata: "A Child Is Born" (David Williams) Malcolm Scott, Director; Mrs. Bolen, Accomp.
- 8:00 PM—Lamar Senior High School Mixed Chorus, Houston, Texas, Norma Lowder, Director
- 9:00 PM—Prayer for Peace

SUNDAY, DECEMBER 22:

- 3:00 PM—Gonzaga High School Band
Joseph D'Urso, Director
- 4:00 PM—Choir and Handbell Ringers,
Agar Road United Methodist
Church, West Hyattsville, Mary-
land, Roland Steer, Eunice Gross,
Directors
- 4:30 PM—Chancel and Junior Choirs,
Bethlehem utheran Church, Fair-
fax, Virginia, Darwin Mercer,
Marian Blalock, Directors
- 5:00 PM—The Columbians, Washington,
D. C., John Bradshaw, Director
- 6:00 PM—Grace Wall, Folk Art Singer &
Irish Minstrel, Colonial Beach,
Virginia
- 6:30 PM—Academy of the Holy Names
Glee Chorus, Silver Spring, Mary-
land, Sister M. Rinella, Director
- 7:30 PM—Choir of the Sacred Heart
Catholic Church, Bowie, Mary-
land, Joe Bottner, Director
- 8:00 PM—Bishop MacNamara High School
and Chorus Forestville, Mary-
land, Brother Robert Antonetti,
Director
- 9:00 PM—Prayer for Peace

MONDAY, DECEMBER 23:

- 3:00 PM—Western High School Band,
Washington, D. C., John F. Thie-
mann, Director
- 4:00 PM—Caroling Around the Yule Log,
Junior Girl Scout Troop #1791,
W. Springfield, Va., Troop #248,
Washington, D. C., Mrs. Lou
Chittenden, Mrs. J. L. Lane,
Leaders
- 4:30 PM—Caroling Around the Yule Log,
Five Girl Scout Troops, W.
Springfield, Virginia, Mrs. Henry
Hobbs, Area Coordinator
- 5:00 PM—Asbury Junior Choir, Chamber-
lain Heights Methodist Church,
Richmond, Virginia, Mrs. J. Rod-
dy Jones, Director
- 5:30 PM—The Duvallaires Madrigal Sing-
ers, Duval High School, Glen-
mont, Maryland, Carolyn Shan-
non, Director
- 6:00 PM—Westover Chorale, Westover
Baptist Church, Arlington, Vir-
ginia, Kathy Riddle, Cliff Met-
calf, Directors
- 6:30 PM—Immaculate Conception Academy
Academy Chorus, Washington,
D. C., Sister Rose, Director
- 7:00 PM—Charles W. Woodward High
School Concert Choir, Rockville,
Maryland, Olga Gazda, Director

- 7:30 PM—Chapel (Youth) Choir, Columbia
Baptist Church, Falls Church,
Virginia
Cantata: "God with us" (Philip
Young) Malcolm Scott, Director
- 8:00 PM—Junior Choir, Clarendon Baptist
Church, Arlington, Virginia, Paul
Hall, Director
- 8:30 PM—Mennonite Men's A Capella
Chorus, Cottage City, Maryland,
Lewis Good, Jr., Director, The
Reverend Irvin Martin, Sr.,
Pastor
- 9:00 PM—Prayer for Peace

TUESDAY, DECEMBER 24:

- Recorded Music
until 8:00 P.M.
- 8:00 PM—The Walton Singers, Washing-
ton, D. C., Samuel Bonds, Direc-
tor
- 9:00 PM—Prayer for Peace

WEDNESDAY, DECEMBER 25:

- Recorded Music
until 7:00 P.M.
- 7:00 PM—Schuhplattler Verein Washing-
tonia, Rudi Pohlstahl, Leader
- 9:00 PM—Prayer for Peace

THURSDAY, DECEMBER 26:

- 3:00 PM—Choir and Handbell Ringers,
Nativity utheran Church, Read-
ing Pennsylvania, Irvin Dohner,
Director
- 4:00 PM—Vermont Avenue Baptist Church
Youth Choir and members of
Shaw J.H.S. Glee Club, Mrs.
Dorothy Carter, Director
- 4:30 PM—Caroling Around the Yule Log,
Girl Scout Troops #172 & 2036 of
Springfield & Falls Church, Va.,
Mrs. Thomas Downing & Mrs.
Francis Murphree, Leaders
- 5:00 PM—Ursuline Academy Glee Club
Bethesda, Maryland, Sister Pius,
O.S.U., Director
- 6:30 PM—Caroling Around the Yule Log,
Girl Scout Troop #7, Brownie
Troop #1423, Woodbridge, Vir-
ginia, Mrs. Nicholls, Mrs. Field,
Leaders
- 7:00 PM—Choir, Brass and Handbell En-
sembles Nativity Luth'a Church
Reading, Pa., Irvin Dohner, Dir.
- 8:00 PM—Falls Church High School Ma-
drigal Singers, Falls Church, Vir-
ginia, Jerry Holloway, Director

8:30 PM—Robert Goddard Junior High School Chorus, Lanham, Maryland, Ray Miles, Director
9:00 PM—Prayer for Peace

FRIDAY, DECEMBER 27:

5:00 PM—Ancient Instrument Society of Washington, Willis M. Gault, Director
6:00 PM—Choir and Handbell Ringers, Christ Lutheran Church, Allentown, Pennsylvania, Daniel Hermany, Director; The Reverend J. J. Deisinger, Pastor
7:00 PM—Columbia Bell Ringers, Columbia Baptist Church, Falls Church, Virginia, Phyllis Lind, Director
8:00 PM—St. George Syrian Orthodox Church Choir, Washington, D. C. George Amouri, Director
9:00 PM—Prayer for Peace

SATURDAY, DECEMBER 28:

3:00 PM—Choir and Handbell Ringers, Christ Lutheran Church, Allentown, Pennsylvania, Daniel Hermany, Director
4:30 PM—Drama, Revival Temple Sunday School Group, Washington, D.C., Willetta Langon, Director
5:30 PM—McKinley High School Band, Washington, D. C., Andre Owens, Director
7:00 PM—Bell Ringers of Fairless Hills Methodist Church, Fairless Hills, Pennsylvania, Mrs. John Guarina, Director

8:00 PM—Washington Folk Dance Society of Washington, Dave and Nancy Rosenberg, Leaders
9:00 PM—Prayer for Peace

SUNDAY, DECEMBER 29:

Recorded Music
3:00 PM—Caroling around the yule log, CYO group, St. Bernadine Catholic Church, Suitland, Maryland, Mike Garvey, Leader
4:00 PM—Chorus "Christmas Around the World" Clay Elementary School, Arlington, Va., Barbara Bland, Director
9:00 PM—Prayer for Peace

MONDAY, DECEMBER 30:

3:00 PM—Young People's Ballet Theatre, Bethesda, Md., Tomi Baker, Dir.
4:00 PM—Caroling around the yule log, Girl Scout Troop #418, Springfield, Virginia, Miss Scriven, Leader
8:00 PM—Folk Dancing, The Armenian Folk Dance Group of Greater Washington, Mrs. Seda Gelenian, Director

TUESDAY, DECEMBER 31:

Recorded Music
9:00 PM—Prayer for Peace

WEDNESDAY, JANUARY 1:

Recorded Music
9:00 PM—Prayer for Peace

Acknowledgements

THE NATIONAL COMMUNITY CHRISTMAS TREE

Courtesy of the Governor and Citizens of Utah, Utah Forestry and Fire Control, Uinta National Forest, Boise Cascade Co., Utah Nurseryman's Assoc., Utah Highway Patrol, Wasatch County Sheriff, Demis Co., Shurtleff and Andrews Co., Schmidt Sign Service, and the Utah National Guard.

TRANSPORTATION OF THE TREE

Courtesy of the Denver and Rio Grande Western R. R., Missouri and Pacific R. R., and the Baltimore and Ohio R. R.

UNLOADING OF THE NATIONAL COMMUNITY TREE

Courtesy of the D. A. Foster Equipment Corporation.

LIGHTING OF THE NATIONAL COMMUNITY TREE

Courtesy of the General Electric Company, its lighting division and engineering staff, and the Potomac Electric Power Company.

THE FIFTY-SEVEN TREES

Courtesy of the American Mining Congress and the Peabody Coal Company of St. Louis, Missouri.

TRANSPORTATION OF STATE TREES

Courtesy of the Ligon Specialized Hauler Inc. of Madisonville, Kentucky.

FIRST AID CORPS

Courtesy of D. C. Chapter, American Red Cross.

COFFEE FOR PARTICIPANTS

Courtesy of Wilkins Coffee Company

CREAM AND HOT CHOCOLATE FOR PARTICIPANTS

Courtesy of Sealtest Foods.

REINDEER

Courtesy of the State of Alaska and National Zoological Park.

TRAILER FOR INFORMATION OFFICE

Courtesy of Green Acres Mobile Homes of Maryland, Inc.

SPECIAL ASSISTANCE

Courtesy of Chesapeake and Potomac Telephone Company.

LIGHTING OF NATIVITY SCENE

James D. Waring, Speech and Drama Department, the Catholic University of America.

SPECIAL ASSISTANCE

George W. Allen Company.

The Christmas Pageant of Peace, Inc.

1025 VERMONT AVENUE, N. W. SUITE 205
WASHINGTON, D. C. 20005 NATIONAL 8-1804

EDWARD R. CARR, PRESIDENT
JOHN M. DALTON, CHAIRMAN

July 10, 1969

Mr. Nash Castro, Regional Director
National Capital Park Central
1100 Ohio Drive, S. W.
Washington, D. C. 20242

Dear Mr. Castro:

It is hereby requested that the Christmas Pageant of Peace, Inc., be granted a permit for the exclusive use of the Ellipse area, adjacent roadways and stage for the purpose of conducting the annual Christmas Pageant of Peace program for 1969. The period of usage will be from twelve noon, December 10, 1969 to midnight January 2, 1970.

Also, permission is requested for the use of the Stage and related areas for organized groups, approved by us, for the purpose of conducting a program of Christmas type entertainment for the public and related to the Pageant.

As you well know, we have conducted a similar program for the past 15 years at which time we have erected the Nation's Community Christmas Tree. The program is viewed on opening night by approximately ten thousand people and an aggregate of five hundred thousand people during the program period. The response has been very gratifying and certainly adds to the overall community life of the area.

Your cooperation in granting this permit will be greatly appreciated.

Sincerely yours,



Edward R. Carr
President

ERC/ytb

Allen v. Hickel
Civil Action No. 1951-69
Attachment B1 to Affidavit of
Russell E. Dickenson
Government Exhibit 1

INTERIOR DEPT.

AUG 4 - 1969

SOLICITOR

- 41 -

AB227-202(NCPC)

July 31, 1969

Mr. Edward R. Carr, President
Christmas Pageant of Peace, Inc.
1025 Vermont Avenue, N. W.
Suite 205
Washington, D. C. 20005

Dear Mr. Carr:

With regards to your request of July 10, 1969, permission is granted to the Christmas Pageant of Peace Incorporated to have the exclusive use of the Ellipse area, adjacent roadways and stage to prepare for and conduct the annual Christmas Pageant of Peace Program from 12 noon, December 10, 1969 through midnight, January 2, 1970.

It is understood that the Christmas Pageant of Peace, Inc. may authorize and schedule during this period the use of the stage to organized groups for the purpose of presenting to the public entertainment relating to the Pageant on Christmas and seasonal type programs.

Once again, the National Capital Parks - Control will be pleased to cooperate with the Christmas Pageant of Peace, Inc. in this program. It is gratifying to know the great national interest in this Pageant, particularly in the lighting ceremony participated in by the Nation's President. We hope this year's Pageant of Peace enjoys the same success as in previous years.

Sincerely yours,

SIGNED
William R. Failer
Superintendent

cc:
Files - NCPC
Reg. Dir. Castro
Mr. Ken Torgman - SOL
Supt. Wm. Failer
Mr. Roger Culver
Mr. Barrett Sawyer
Mr. Ted Smith
NCR Files

Allen v. Hickel
Civil Action No. 1951-69
Attachment B2 to Affidavit of
Russell E. Dickenson

Government Exhibit 1

The Christmas Pageant of Peace, Inc.

1025 VERMONT AVENUE, N. W. SUITE 205

WASHINGTON, D. C. 20005

NATIONAL 8-1804

EDWARD R. CARR, PRESIDENT
JOHN M. DALTON, CHAIRMAN

August 22, 1969

To Whom It May Concern:

Since its inception in 1954, the Christmas Pageant of Peace is visited each year by over 500,000 people. There are well over one million people who view the opening ceremonies on nation-wide television.

Since 1954, the Christmas Pageant of Peace Committee has not received one letter of complaint against the display of the creche. I feel this is irrefutable testimony that the creche is acceptable to the American people.

In the early years of the Pageant, many nations of the world participated in the event. These nations each had a small decorated tree and displayed various symbols of their peoples beliefs. Many of the were non-Christian nations and never once over the years, did they raise any objections to the display of the creche.

A copy of the Certificate of Incorporation is attached. The 3rd paragraph states how the Pageant is financed and the 4th paragraph gives the theme and aim of the Pageant.

The creche is the property of the Christmas Pageant of Peace Committee. Starting in 1968, it is now erected each year by Hargrove Displays, Inc. They also dismantle and store it for the Committee.

Those who would have us abandon the religious aspect of our cultural heritage seem to forget that this country was founded by men who came here to escape religious persecution.

The dismissal of the POAU's suit against the Christmas Stamp in 1967 is surely additional proof of this nation's desires and aspirations to foster understanding and friendship between the American people and nations of the world as we are endeavoring to do through the Christmas Pageant of Peace.

Sincerely yours,



Edward R. Carr
President

Allen v. Hickel
Civil Action No. 1951-69
Attachment C to Affidavit of
Russell E. Dickenson

Government Exhibit 1

The Christmas Pageant of Peace, Inc.

1025 VERMONT AVENUE, N. W. SUITE 205
WASHINGTON, D. C. 20005 NATIONAL 8-1804

EDWARD R. CARR, PRESIDENT
JOHN M. DALTON, CHAIRMAN

October 18, 1968

RECEIVED	
NATIONAL CAPITAL PARK	
OCT 21 1968	
SKIP	
NATIONAL SECRET	
ST. MARY	
ADMIN. OFFICE	
CHIEF, I. & P. U.	
ASST. CHIEF	
CHIEF OF MAINT.	
ASST. MAINT.	
ASST. FACILITIES	
CHIEF-SPCL. EVENTS	
SAFETY OFFICER	
USAP LIAISON	
FILE	

Mr. William Failor, Superintendent
National Capital Park Central
1100 Ohio Drive, S. W.
Washington, D. C.

Dear Mr. Failor:


It is hereby requested that the Christmas Pageant of Peace, Inc., be granted a permit for the exclusive use of the Ellipse area, adjacent roadways and stage for the purpose of conducting the annual Christmas Pageant of Peace program for 1968. The period of usage will be from twelve noon, December 14, 1968 to midnight January 2, 1969.

Also, permission is requested for the use of the stage and related areas for organized groups, approved by us, for the purpose of conducting a program of Christmas type entertainment for the public and related to the Pageant.

As you well know, we have conducted a similar program for the past 14 years at which time we have erected the Nation's Community Christmas Tree. The program is viewed on opening night ceremonies by approximately ten thousand people and an aggregate of five hundred thousand people during the program period. The response has been very gratifying and certainly adds to the overall community life of the area.

Your immediate response and cooperation would be greatly appreciated.

Sincerely yours,


Edward R. Carr
President

ERC/ytb

Allen v. Hickel
Civil Action No. 1951-69
Attachment D to Affidavit of
Russell E. Dickenson

Government Exhibit 1

A8227-NCR(NCPS)

November 22, 1968

Mr. Edward R. Carr, President
Christmas Pageant of Peace, Inc.
1025 Vermont Avenue, N. W.
Suite 205
Washington, D. C. 20005

Dear Mr. Carr:

There is submitted herewith a permit to the Christmas Pageant of Peace, Incorporated for the use of the Ellipse area. This permit is in lieu of, and voids, the permit dated October 25, 1968.

In accordance with your request of October 13, permission is granted the Christmas Pageant of Peace, Inc. the exclusive use of the Ellipse area, adjacent roadways, and stage for the purpose of preparing for the conducting of the annual Christmas Pageant of Peace Program from 12 noon, Friday, December 13, 1968 through January 2, 1969.

In granting this permission, the Christmas Pageant of Peace may authorize and schedule during the period of the permit the use of the stage to organized groups for the purpose of presenting to the public Christmas and seasonal-type of programs or entertainment relating to the Pageant.

[In accordance with arrangements made with representatives of the Christmas Pageant of Peace Committee, the National Capital Region, and the American Civil Liberties Union, there will be no National Park Service involvement in the storage, maintenance, repair, erection, or disassembling of the Creche. These activities will be the responsibility of the non-Federal membership of the Pageant of Peace Committee.]

Permission is granted the Pageant of Peace Committee to erect the Creche on the Ellipse as a part and for the duration of the Pageant of Peace.

Allen v. Hickel
Civil Action No. 1951-69
Attachment E to Affidavit of
Russell E. Dickenson

Government Exhibit 1

The National Capital Parks - Central will be glad to work again with the Christmas Pageant of Peace, Inc. this year and are glad to learn from you that an aggregate of five hundred thousand people viewed the tree and Pageant last year and that the official tree lighting program, participated in by the Nation's President, is of such national interest.

Sincerely yours,

William R. Faylor
Superintendent

cc:

Files - NCPC

Mr. Tom Foster

Mr. Earl Hargrove

U. S. Park Police

Lt. Conover

Regional Director

Supt. Faylor

Mr. Everett Sawyer

→ Mr. Ted Smith

NCR Files

TTSaith:ujf:11/22/68

A8227-NCR(SD)

September 10, 1968

RECEIVED NATIONAL CAPITAL PARKS - CENTRAL		
SEP 13 1968		
<input checked="" type="checkbox"/>	SUP. INCHARGE	
<input checked="" type="checkbox"/>	PAYABLE ASST.	11/5
<input checked="" type="checkbox"/>	SECRETARY	
<input checked="" type="checkbox"/>	ADMIN. OFFICER	
<input checked="" type="checkbox"/>	CHIEF, I & RM	
<input checked="" type="checkbox"/>	ASST. CHIEF	
<input checked="" type="checkbox"/>	CHIEF OF MAINT.	
<input checked="" type="checkbox"/>	ASST. CHIEF	
<input checked="" type="checkbox"/>	ASST. FACILITIES	
<input checked="" type="checkbox"/>	CHIEF, SPCL. EVENTS	
<input checked="" type="checkbox"/>	SAFETY OFFICER	
<input checked="" type="checkbox"/>	USPP LIAISON	
<input checked="" type="checkbox"/>	FILE	

Mr. Lawrence Speiser
Mr. John Adams
American Civil Liberties Union
Suite 501
1424 16th Street, N. W.
Washington, D. C. 20036

Dear Larry and John:

Your letter of August 5 and our discussion prior to receipt of that letter concerned the appropriateness of the display of the Creche in connection with the annual Pageant of Peace on the Ellipse. You questioned the propriety of National Park Service activities with respect to the Creche, in view of the "establishment clause" of the First Amendment to the Constitution and the court decisions which have interpreted it.

After considering the position asserted in the discussion and in your letter, and with the view towards facilitating the continuance of the Pageant, with its theme of peace and universal brotherhood, as an annual community event, we have made different arrangements concerning the Creche. Under these arrangements there will be no National Park Service involvement in the storage, maintenance, repair, erection or disassembly of the Creche. These activities will be the responsibility of the non-Federal membership of the Pageant of Peace Committee. Under a permit from the Service to the Committee, we will allow the Creche to be erected on the Ellipse as a part and for the limited duration of the Pageant of Peace.

We are appreciative of the opportunity to discuss this with you and your associates and believe that the exchange of ideas such as we have here is always useful.

With all best wishes,

Sincerely yours,

(Sgd.)

Wash Castro
Regional Director

Allen v. Hickel
Civil Action No. 1951-69
Attachment F to Affidavit of
Russell E. Dickenson

Government Exhibit 1

Mr. Castro
NCR-File Copy

MEYER: NCASTRO:dh

Mr. Hamel) w/o of Inc.

cc: Mr. (ATTN: Mr. Hamel) w/o of Inc.
NPS Mr. Meyer w/o of Inc.
Mr. Edward R. Carr w/o of Inc.
Mr. Supt. Faylor w/o of Inc.
NCR-Supt.

POTOMAC ELECTRIC POWER COMPANY

929 E STREET, NORTHWEST

WASHINGTON, D. C. 20002

SALES DIVISION

March 3, 1959

The Christmas Pageant of Peace, Inc.

Suite 205

1025 Vermont Avenue, N. W.

Washington, D. C. 20005

Attention: Mr. Edward R. Carr

Gentlemen:

Subject: Bill for Electric Service and
1953 Donation

Enclosed is our bill in the amount of \$1,075.65 for electric energy consumption at the 1953 Christmas Pageant of Peace during the period November 30, 1953 to January 6, 1959.

This bill does not include the cost of installing and removing the electric service connection facilities, estimated to be \$1,255.00, which we will consider as our contribution to the Pageant.

If you have any questions about this bill please let us know.

Very truly yours,

C. W. Nicholson

C. W. Nicholson

Manager

Governmental Customer Department

Enclosure

Allen v. Hickel
Civil Action No. 1951-69
Attachment G1 to Affidavit of
Russell E. Dickenson

Government Exhibit 1

COY KILGUST
of Electric Service

March 6, 1969

Mr. C. W. Nicholson
Potomac Electric Power Company
929 E Street, N. W.
Washington, D. C. 20004

Dear Mr. Nicholson:

Thank you for your letter and bill which I have forwarded to the Washington Board of Trade for payment since they handle this account for us.

We are all most grateful to PEPSCO for their generous contribution to the Regiment. We seem to have a good size deficit this year so we are deeply indebted for this support.

Thank you again.

Sincerely,

Edmund R. Carr

ERC/yth

Allen v. Hickel
Civil Action No. 1951-69
Attachment G2 to Affidavit of
Russell E. Dickenson

Government Exhibit 1

A8227-NCR(NCPC)

September 8, 1969

Memorandum

To: Acting Regional Director
From: Superintendent, National Capital Parks - Central
Subject: Pageant of Peace, 1968

In accordance with your verbal request of September 5, on the Pageant of Peace activities for 1968 and our review of the matter, I wish to report that no work or cost was incurred by NPS forces in connection with the display of the creche on the Ellipse for the 1968 Pageant of Peace.

Our involvement for the 1968 Pageant included preparing the area for the showmobile, installing walks, temporary access drive and parking, platforms, deer yard display and building, setting the trees, horticulture activities, keeping activities operating from 4 p.m. to 1 a.m. daily, and dismantling of these facilities. The U. S. Park Police, of course, offered police services throughout the pageant.

Signed

William R. Failor

In duplicate

cc:
Mr. Ken Tapman, Solicitor's Office
Mr. Smith
Mr. Failor
Chief, U. S. Park Police
NCR Files
NCPC Files

WRFailor:rrf

Allen v. Hickel
Civil Action No. 1951-69
Attachment H1 to Affidavit of
Russell E. Dickenson

Government Exhibit 1

July 15, 1969

Memorandum

To: Superintendent, MCP - Central
From: Chief, Division of Facilities Maintenance
Subject: Pageant of Peace cost

We submit out cost for the Pageant of Peace for 1958-69 as recorded in the accounts Division. This includes preparing the area to receive the showmobile. Then setting up the many walks, platforms, Deer-yard and building, setting the trees, electrical, painting, carpentry, Horticultural activities, keeping the area and buildings policed for trash, keeping all activities operating from 4:00 P.M. to 1:00 A.M. daily.

After the event, labor, material, equipment was used for dismantling, and putting the area back in condition as before the Pageant.

Total cost labor, material, and equipment \$72,789.78.

Roger L. Sulcer

RS/acp
✓ACFC:files
R32: files

Allen v. Hickel
Civil Action No. 1951-69
Attachment H2 to Affidavit of
Russell E. Dickenson

Government Exhibit 1

SEP 30 1969
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REVEREND THOMAS B. ALLEN,
et al.,

Plaintiffs,

-vs-

WALTER J. HICKEL
Secretary of the Interior,
et al.,

Defendants.

Civil Action No. 1951-69

J U D G M E N T

This cause having come before the Court on plaintiffs' motion for summary judgment, and defendants' motion to dismiss, or, alternatively, for summary judgment, and on plaintiffs' motion for preliminary injunction and defendants' opposition thereto; and upon consideration of the argument of counsel, the record (including affidavits) and the memoranda of the parties; and the Court being fully informed in the premises, and having entered its oral opinion in the matter,

It is by the Court this _____ day of _____, 1969,

ORDERED AND ADJUDGED:

(1) That defendants' motion to dismiss for lack of jurisdiction, in that plaintiffs lack standing to sue, be, and is hereby, granted;

(2) That, alternatively, assuming jurisdiction, and it appearing to the Court that there exist no genuine issues of material fact and defendants are entitled to judgment as a matter of law, defendants' motion for summary judgment be, and hereby is, granted;

(3) That plaintiffs' motion for summary judgment be, and hereby is, denied;

(4) That the action be, and hereby is, dismissed; and

(5) That plaintiffs' motion for preliminary injunction be, and hereby is, denied as moot.

UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of the foregoing proposed Judgment has been made upon plaintiff by mailing a copy thereof to their attorney, Warren K. Kaplan, Esq., 815 Connecticut Avenue, N. W., Washington, D. C. 20006, and by mailing a copy thereof to their co-counsel Ralph J. Temple, Esq. and Lawrence Speiser, Esq., American Civil Liberties Union and Fund, 1424 - 16th Street, N. W., Washington, D. C. 20036, this 29th day of September, 1969.

/s/

GIL ZIEGLERMAN

Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REVEREND THOMAS B. ALLEN,
et al.,

Plaintiffs

v.

WALTER J. HICKEL, et al.,

Defendants

)
)
)
) Civil Action No. 1951-69
)
)
)
)
)
)

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Reverend Thomas B. Allen, James E. Curry, Edward L. Ericson, Rabbi Eugene J. Lipman and Father George Malzone, plaintiffs herein, hereby appeal to the United States Court of Appeals for the District of Columbia, from the Order of September 30, 1969, granting the Motion of the defendants to dismiss the Complaint.

OF COUNSEL:

Ralph J. Temple
American Civil Liberties Union Fund
1424 16th Street, N.W.
Washington, D. C. 20036

Warren K. Kaplan
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
Telephone: 298-8540
Attorney for Plaintiffs

Certificate of Service

I hereby certify that a copy of the foregoing Notice of Appeal was mailed, postage prepaid, this 7th day of October, 1969, to Gil Zimmerman, Assistant U.S. Attorney, U.S. Courthouse, Washington, D.C. 20001, attorney for defendants.

Warren K. Kaplan

IN THE SUPREME COURT OF THE STATE OF OREGON

In Banc

Raymond N. Lowe, Corrinne R. Hill, W. A.
Brooksby, Abe Brooks, G. Douglas
Straton, Alfred Bloom, James Witzig,
Claire L. Newport, Dirk P. Ten Brinke
and E. Jean Ware,

Respondents,

v.

City of Eugene, of Lane County, Oregon,
a municipal corporation; Edwin E. Cone
in his official capacity as Mayor of
Eugene; Lester E. Anderson, John O. Chatt,
R. G. Crakes, Ray Hawk, Bruce A. Lassen,
Catherine Lauris, R. E. McNutt, Glen L.
Purdy, each in his official capacity as a
member of the Common Council of Eugene;
David D. Campbell dba C & S Electric; Allen
E. Hamilton, Allen E. Hamilton, Jr., Lillian
T. Hamilton; J. F. Oldham & Son, Inc.,

Defendants,

Eugene Sand & Gravel, Inc.,

Appellant.

* * * * *

Appeal from Circuit Court, Lane County.

William S. Fort, Judge.

Argued on rehearing June 2, 1969. Former opinion
filed February 26, 1969. 87 Or Adv Sh 1059,
451 P2d 117.

John E. Jaqua and William G. Wheatley, Eugene,
argued the cause for appellant on rehearing.
On the brief opposing rehearing was William
G. Wheatley, Eugene.

Barbara B. Aldave, Eugene, and Leo Pfeffer, New
York, New York, argued the cause for respondents
on rehearing. With them on the petition for
rehearing and brief was James B. Harrang, Eugene.

Warren Cameron, Seattle, Wash., and Richard D.
Curtis and Hansen, Curtis & Strickland, Eugene,
filed a brief for Leslie D. Erb et al, citizens
of the City of Eugene, as amici curiae.

Before Perry, Chief Justice, and McAllister, Sloan,
O'Connell, Goodwin, Denecke, and Holman, Justices.

GOODWIN, J.

Former opinion withdrawn; decree affirmed.

1 GOODWIN, J.

2 The trial court, in a suit for declaratory relief,
3 ordered the City of Eugene and the other named defendants
4 to remove from a public hilltop park a neon-lighted con-
5 crete cross some 50 feet tall which, when lit, was visible
6 for several miles over a major part of the city of Eugene.
7 On appeal, this court reversed the trial court's decree.
8 The matter is before us again, on a petition for rehearing.

9 In a brief and upon oral argument, counsel challenged
10 the propriety both of the granting of the rehearing and of
11 the submission of the cause to a court that contained a jus-
12 tice who had not participated in the original decision.

13 On January 6, 1969, the original appeal was argued
14 before a court consisting of Chief Justice Perry and Jus-
15 tices McAllister, Sloan, O'Connell, Goodwin, Denecke, and
16 Langtry. In the absence of Justice Holman, a regular member
17 of the court, Justice Langtry was sitting as a Justice pro
18 tempore duly assigned to this court pursuant to ORS 2.052.

19 The court handed down its original opinion on Febru-
20 ary 26, 1969, reversing the trial court. Justices Perry,
21 Sloan, Denecke, and Langtry voted for reversal. Justices
22 McAllister, O'Connell, and Goodwin dissented. *Lowe v. City*
23 *of Eugene*, 87 Or Adv Sh 1059, ___ Or ___, 451 P2d 117 (1969).

24 The plaintiffs filed a petition for rehearing. On
25 April 22, 1969, the court in its regular weekly conference
26 considered the petition. Four of the regular justices who
27 had participated in the original decision favored granting
28 the petition. The other two regular justices and Justice
29 Langtry opposed granting the petition. Since four of the
30

1 regular justices who had participated in the original
2 decision voted for a rehearing, it was unnecessary to decide
3 whether Justice Holman or Justice Langtry or neither of
4 them or both of them should vote on the petition. The peti-
5 tion was granted.

6 The rehearing was set for June 2, 1969. On that date
7 the cause was argued before the seven regular justices of
8 the Supreme Court, none then being absent or disqualified.
9 The court was thus convened according to the practice fol-
10 lowed when a case is reargued in banc and no regular justice
11 is disqualified. Justice Langtry had been appointed to
12 serve for ninety days beginning the first judicial day in
13 January, and his term had expired before June 2, 1969. The
14 submission of the cause on rehearing to the seven regular
15 justices, including Justice Holman, was correct.

16 The question whether a justice who did not participate
17 in an original decision is barred from subsequent considera-
18 tion of that case is potentially troublesome in any juris-
19 diction which allows rehearings. There are numerous reasons
20 other than that of disqualification for a particular justice
21 to be absent from a particular argument. Moreover, if the
22 reason for the original absence was temporary, it is likely
23 that the absent justice will be available for duty when the
24 case is argued on rehearing.

25 Two lines of precedent in the United States deal with
26 this situation.

27 In some jurisdictions a regularly elected justice who,
28 for any reason, does not participate in an original decision
29 does not participate in any subsequent considerations of
30 that case. The reasons for the rule are set out in Gas

1 Products Co. v. Rankin, 63 Mont 372, 207 P 993, 24 ALR
2 294 (1922); Flaska v. State, 51 NM 13, 177 P2d 174 (1946);
3 Cordner v. Cordner, 91 Utah 474, 64 P2d 828 (1937); Rohlfing
4 v. Moses Akiona, Ltd., 45 Hawaii 440, 369 P2d 114 (1963);
5 but cf. Yoshizaki v. Hilo Hospital, 50 Hawaii 40, 429 P2d
6 829 (1967).

7 In California, the court as it is constituted on the
8 day a case is argued on rehearing is the Supreme Court for
9 the purpose of the vote on the questions argued. A regularly
10 elected justice who is present for duty and not disqualified
11 hears argument and participates in the vote. See Metropol-
12 itan Water Dist. v. Adams, 19 Cal 2d 463, 122 P2d 257 (1942).
13 Accord, Glasser v. Essaness Theatres Corp., 346 Ill App 72,
14 89-100, 104 NE2d 510 (1952); Battle v. Mason, 293 P2d 324,
15 333-334 (Okla 1955).

16 We believe that the better reasoned cases are those
17 which follow the California rule.

18 The institution of rehearing was invented and has
19 survived because it is beneficial to the administration of
20 justice. This court permits any party to file a petition
21 for rehearing within 20 days following the publication of
22 our opinion announcing a decision. Oregon Supreme Court
23 Rule 47.

24 Every petition is carefully considered by the court.
25 On any given date the court may be made up of seven justices
26 who may not be the same seven who constituted the court the
27 day, the week, or the month before. This change in the
28 court's composition may be the result of many factors: e.g.,
29 illness, retirement, election. The court nonetheless votes
30

1 and makes decisions as a court, not as a collection of
2 individual justices.

3 Both initially and upon rehearing, the parties have
4 the right to a decision by a lawfully constituted court.
5 They do not have a right to a decision by a particular
6 judge or group of judges. In the case at bar, no decree
7 has yet been placed beyond the power of this court to recall,
8 modify or reverse; the cause is still pending. Until the
9 time for rehearing has expired, the party in whose favor a
10 decision is rendered has no vested right in the decision that
11 would preclude its re-examination and vacation in the ordi-
12 nary course of judicial administration. Metropolitan Water
13 Dist. v. Adams, 19 Cal 2d at 475.

14 When the court, on June 2, 1969, heard argument on
15 rehearing, Justice Holman was present for duty, was not dis-
16 qualified, and had both the right and the duty to vote on
17 the merits of the case.

18 We hold, therefore: (1) that regardless of the num-
19 ber of justices available and qualified to vote, the peti-
20 tion for rehearing in this case was properly granted by a
21 majority vote of a lawfully constituted court; (2) when the
22 case came on in due course for argument on rehearing it was
23 heard before a lawfully constituted court.

24 The majority of the court before which the case was
25 argued on June 2, 1969, is of the opinion that the decree
26 of the trial court should be affirmed for the reasons sub-
27 stantially as set forth in the dissenting opinion handed down
28 on February 26, 1969. The former majority opinion handed
29 down on February 26, 1969, is accordingly withdrawn. The
30 decree entered below is affirmed. Neither party shall have
costs in this court.

DENECKE, J., dissenting.

I concur in that part of the majority opinion approving the granting of the petition for rehearing and the procedure on rehearing. Upon the constitutional issue, however, I dissent for the reasons stated in my specially concurring opinion filed with our former decision.

Perry, C. J., joins in this dissent.

No. 23,544

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REVEREND THOMAS B. ALLEN, *et al.*,
Appellants,

v.

WALTER J. HICKEL, Secretary of the Interior, *et al.*,
Appellees.

BRIEF FOR THE APPELLANTS

United States Court of Appeals
for the District of Columbia Circuit

FILED OCT 30 1969

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

REVEREND THOMAS B. ALLEN,
et al.,
Appellants,

v.

WALTER J. HICKEL,
Secretary of the Interior,
et al.,
Appellees,

Case No. 23544

BRIEF FOR THE APPELLANTS

ISSUES PRESENTED FOR REVIEW

1. Does a federal taxpayer have standing to challenge the constitutionality of a federal expenditure as being in violation of the Establishment and Free Exercise Clauses of the First Amendment, without proof that the challenged expenditure is substantial?

2. If substantiality is required, is that requirement satisfied by a showing that the expenditure involves: (a) an unallocated portion of an overall appropriation of \$43,049,000.00; (b) a contribution of the use of strategically located federal lands, which would be of substantial value to a commercial advertiser; and (c) a direct contribution of \$72,000.00 for labor, materials and equipment, plus supporting police and administrative services, for the overall program of which the challenged activity is a central and inseparable part.

3. Is a federal expenditure for a celebration to be held on national park land within the scope of the Taxing and Spending Clause of Article I, Section 8 of the Constitution?

4. Do citizens have standing to challenge a violation of the Free Exercise Clause of the First Amendment, independently of their status as taxpayers?

5. Are the Establishment or Free Exercise Clauses of the First Amendment violated by the use of federal lands and monies for the erection and maintenance of a life-sized nativity scene ("creche"), as part of a Christmas display, where: (1) the creche is provided and erected by a private, non-profit corporation, whose executive officers include Cabinet and lesser ranking federal officials; (2) the program of which the creche is a part is determined by a committee composed of high ranking federal officials and prominent religious leaders; and (3) the avowed purpose of the inclusion of the creche in the program is to represent "the religious heritage aspect" of Christmas.

REFERENCES TO RULINGS

The Order presented for review by this Court is the Order of the District Court of September 30, 1969, (App. pp. 51-2).

STATEMENT OF THE CASE

This is an action brought by five taxpayers for injunctive and declaratory relief against the Secretary of the Interior and subordinate officers of the National Park Service. Plaintiffs challenge the constitutionality of permitting and maintaining a creche on the Ellipse, adjacent to the White House, as part of the Christmas Pageant for Peace, and assert that such conduct is in violation of the Establishment and Free Exercise Clauses of the First Amendment. The complaint was coupled with a motion for preliminary injunction. Defendants moved to dismiss for lack of standing, or for summary judgment, and plaintiffs filed a cross-motion for summary judgment. After hearing on September 30,

THIS CASE HAS NOT BEEN BEFORE THIS COURT PREVIOUSLY.

1969, the District Court (Pratt, J.) granted the defendants' motion to dismiss; granted, in the alternative, the defendants' motion for summary judgment; and denied plaintiffs' motion for preliminary injunction and for summary judgment. From this Order, plaintiffs appeal.

The plaintiffs in this case consist of four clergymen of various denominations and one atheist. (Appendix, p. 2). All are citizens and taxpayers of the United States and are residents of the District of Columbia or the metropolitan area. (Appendix, p. 2). Defendant Walter J. Hickel is Secretary of the Interior of the United States. Defendant Nash Castro is Regional Director of the National Park Service. Defendant William Failor is Superintendent of the National Park Central. (Appendix, p. 2).

The "Christmas Pageant of Peace" is "officially recognized [by the National Park Service] as an annual national celebration event." (Appendix, p. 18). It takes place in the nation's capitol on the Ellipse (President's Park) area during the period from about December 10th through the following January 2nd. The Christmas Pageant has traditionally been closely associated with the White House and the President, (Appendix, p. 19), although since 1954 it has been nominally sponsored and produced by a private, non-sectarian corporation, The Christmas Pageant of Peace, Inc. (Appendix, p. 19).

The Vice President of the Christmas Pageant of Peace, Inc. is the defendant Nash Castro, who is also Regional Director of the National Park Service (Appendix, p. 32). Mr. Castro also serves as Vice Chairman of the Executive Committee (Appendix, p. 32). The Honorary Committee is chaired by the Secretary of the Interior, and members of the Committee include various other Cabinet officers, sub-Cabinet officers, Congressmen, military personnel, along with the Episcopal Bishop of Washington, the Catholic Archbishop of Washington, and Executive Director of the Council of Churches of Greater Washington, and others (Appendix, pp. 30, 31). Personnel of the National Park Service and other federal agencies serve on the Executive Committee, Program Committee, Grounds and Facilities Committee, Military Participation Committee, Pageant Festival Committee and Seating Committee (Appendix, pp. 32, 33).

The "official cooperation" by the National Park Service with the Christmas Pageant of Peace, Inc. in producing the Pageant extends to providing assistance to the Christmas Pageant event as a whole, in the form of digging the pit for the Yule log, setting up platforms, boardwalks, the national Christmas tree, etc.; doing electrical, painting and carpentry work; performing horticultural activities; maintaining the area; collecting trash; and operating all activities from 4:00 p.m. to 1:00 a.m. daily (Appendix, p. 22). The total cost of labor, materials and equipment for the 1968 Pageant event was \$72,789.78 (Appendix, pp. 22, 50) exclusive of the costs of police and administrative personnel.

A central feature of the Christmas Pageant is a life-sized illuminated nativity scene, and it is presently planned that the creche display will be included in the 1969 Christmas Pageant (Appendix, p. 22).

In the summer of 1968, representatives of the American Civil Liberties Union met with Mr. Castro, Regional Director of the National Park Service, and questioned the constitutionality of the creche display. In apparent recognition of the validity of that constitutional objection, the National Park Service sought to legitimize the continuation of the creche display by transferring responsibility to "the non-federal membership of the Pageant of Peace Committee". (See letter of Nash Castro to Lawrence Speiser and John Adams, dated September 10, 1968, Appendix, p. 46).

The Christmas Pageant of Peace is visited each year by over 500,000 people, and there are well over 1,000,000 people who see the opening ceremonies on nationwide television (Appendix, pp. 40, 42). According to Mr. Edward R. Carr, President of the Christmas Pageant of Peace, Inc., no letters of complaint concerning the display of the creche have been received (Appendix, p. 42).

On July 31, 1969, the National Park Service issued a permit for the exclusive use of the Ellipse area, adjacent roadways and stage, for the period December 10, 1969 through midnight January 2, 1970, to the Christmas Pageant for Peace, Inc. for this year's Christmas Pageant of Peace program (Appendix, p. 41).

I. THE COURT BELOW ERRED IN GRANTING
THE GOVERNMENT'S MOTION TO DISMISS
FOR LACK OF STANDING

The government seeks to avoid a confrontation on the merits of this case on the ground that plaintiffs lack standing to sue. Specifically, it claims that plaintiffs cannot invoke the Court's jurisdiction for the alleged reasons, (a) that the federal expenditure being challenged is not "substantial"; (b) that the federal expenditure is not made under the taxing and spending clause of Art. I, Sec. 8; and (c) that the plaintiffs have no "personal stake" in the case to support jurisdiction independently of their status as taxpayers.

Plaintiffs' reply to these contentions is as follows:

1. It is not essential that the challenged expenditure be substantial when a federal expenditure is being challenged under the Establishment Clause of the First Amendment;
2. Even if substantiality were required, it is clear that the federal expenditure of funds and facilities here involved is substantial;
3. The challenged expenditure is being made under the taxing and spending clause of Art. I, Sec. 8; and
4. The plaintiffs have standing to challenge the First Amendment violations independently of their standing as taxpayers.

A. Under The Establishment Clause of The
First Amendment, a Federal Expenditure
May Be Challenged, Whether or Not "Sub-
stantial".

The Government contends, correctly, we believe, that the controlling authority on the question of taxpayers' standing is *Flast v. Cohen*, 392 U. S. 83, 91-106 (1968). The Court in that case, after noting that the Establishment Clause

of the First Amendment specifically limits the taxing and spending power conferred by Art. I. Sec. 8, ruled as follows:

" . . . [W]e hold that a taxpayer will have standing . . . to invoke federal judicial power when he alleges that congressional action under the taxing and spending clause is in derogation of those constitutional provisions which operate to restrict the exercise of the taxing and spending power. The taxpayer's allegation in such cases would be that his tax money is being extracted and spent in violation of specific constitutional protections against such abuses of legislative power. Such an injury is appropriate for judicial redress, and the taxpayer has established the necessary nexus between his status and the nature of the allegedly unconstitutional action to support his claim of standing to secure judicial review." 392 U. S. at 105-6.

Although the Court noted that the expenditure under challenge was substantial, (392 U. S. at 103), the Court nowhere states that this fact was essential to the granting of standing. Indeed, it is apparent from a close reading of the case that the amount of the federal expenditure is quite irrelevant when the challenge is brought under the Establishment Clause.

At three places in the decision, (opinion of the Court, p. 103; concurring opinion of Justice Douglas, pp. 107-8; and concurring opinion of Justice Stewart, p. 114), the Court noted with approval the historic pronouncement of James Madison that the necessary separation of church and state was violated when even "three pence" was appropriated by the government to aid religion. "Memorial and Remonstrance against Religious Assessments," *2 Writings of James Madison* 186, (Hunt Ed. 1901).

The succinct restatement of the holding in the concurring opinions of Justices Stewart (" . . . a federal taxpayer has standing to assert that a specific expenditure of federal funds violates the Establishment Clause of the First Amendment [392 U. S. at 114]), and Fortas ("The status of taxpayer should not be accepted as a launching pad for an attack upon any target other than legislation affecting the Establishment Clause") reflect the Court's traditional vigilance against infringements of the Establishment Clause, no matter how slight.

Probably the most extensive discussion of the scope and purpose of the Establishment Clause is found in *Everson v. Board of Education*, 330 U. S. 1 (1946), in which the Court declared that:

"No tax *in any amount, large or small*, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." 330 U. S. at 16 (emphasis added)

To the same effect, in his dissenting opinion in the same case, Justice Rutledge declared that the Establishment Clause,

"... broadly forbids state support, financial or other, of religion *in any guise, form or degree*. It outlaws *all* use of public funds for religious purposes." 330 U. S. at 33 (emphasis added)

"... the [First] Amendment forbids any appropriation, *large or small*, from public funds to aid or support any and all religious exercises." (emphasis added) 330 U. S. at 41.

In *McCollum v. Board of Education*, 333 U. S. 203 (1947), the Court struck down as a violation of the Establishment Clause a plan whereby religious groups were permitted to use public school classrooms for thirty minutes each week to give religious teaching. With only one Justice dissenting, the Court found this to be a violation of the First Amendment's prohibition, despite the fact that the cost of the program was "... incalculable and negligible the cost is neither substantial nor measurable, and no one can seriously say that the complainant's tax bill has been proved to be increased because of the plan." (Concurring Opinion of Jackson, J., 333 U. S. at 234).

Returning once again to the *Flast* case, *supra*, the requirement there imposed by Chief Justice Warren is not, as the government suggests, that the challenged expenditure be a substantial one, but merely that it be something other than "... an incidental expenditure of tax funds in the administration of an essentially regulatory statute." 392 U. S. at 102. The Chief Justice does not here cite any examples of such permissible incidental expenditures, but a glance at *McGowan v. Maryland*, 366 U. S. 420 (1966), in which the Opinion of the

Court was also written by Chief Justice Warren, tells us what the Chief Justice had in mind:

"However, it is equally true that the 'Establishment' Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide with the tenets of some or all religions. In many instances, the Congress or state legislatures conclude that the general welfare of society, wholly apart from any religious considerations, demands such regulation. Thus, for temporal purposes, murder is illegal. And the fact that this agrees with the dictates of the Judaeo-Christian religions while it may disagree with others does not invalidate the regulation. So too, with the questions of adultery and polygamy The same could be said of theft, fraud, etc., because those offenses were also proscribed in the Decalogue." (citations omitted) 366 U. S. at 442.

Other examples of "incidental expenditures in the administration of essentially regulatory statutes" might presumably include a building inspector who, in the course of his duties, inspects a parochial school; a fireman who extinguishes a fire at a church, or a policeman who protects a man who happens to be a Catholic. Such expenditures, incidental to the administration of essentially regulatory departments, are clearly distinguishable from the present case and are beyond challenge.

Although the *Flast* case does not anywhere require that the challenged expenditure be "substantial", this Court, in applying the *Flast* doctrine in the subsequent case of *Protestants and Other Americans, etc. v. Watson*, ____ U. S. App. ____, 407 F.2d 1264, 1265 (1968), set forth, as one of the required elements, "that there be a *substantial* expenditure". In light of the foregoing discussion of *Flast*, appellants believe that what this Court intended by use of the word "substantial" was that the expenditure must be something more than "an incidental expenditure in the course of an essentially regulatory statute." To construe "substantial" as meaning that the actual amount of the expenditure must be large, as the government contends, is to go quite beyond the language of, and is contrary to the rationale of *Flast*, and introduces a new and undesirable element of uncertainty in the rule of standing.

B. The Challenged Activity Represents A Substantial Expenditure of Federal Funds and Facilities.

Although plaintiffs contend that no showing of substantial expenditure is required to qualify them for standing, (pp. 5-8, *supra*), it is apparent from the undisputed facts in this case that a substantial commitment of federal funds and facilities is, in fact, involved.

The government concedes that in 1968, \$72,789.78 was spent for labor, materials and equipment for the Christmas Pageant for Peace. (Affidavit of Russell Dickenson, Associate Regional Director, National Capital Region, National Park Service, Department of the Interior, p. 5, App. p. 22). But this amount reflects only a fraction of the real federal commitment. It does not include, for example, police services and the time and services of administrative personnel.¹

Most importantly, the stated dollar amount includes not one penny for the value of the use of the land on which the creche is erected—a value immensely enhanced by the place and setting in which the event is staged. The creche, along with the National Christmas Tree, constitutes the focus of attention of a spectacle viewed by approximately ten thousand people on opening night alone, and by an aggregate of five hundred thousand people during the program period. (Attachment B1 to government Exhibit 1, App. p. 40). In placing a value on the use of this tract of ground adjacent to the White House, it is not inappropriate to consider what its advertising value might be to a commercial advertiser. When the exposure of the creche, along with the tree-lighting ceremony, to the millions who watch on nationwide television is added to those who come in person, it is readily apparent that the value of the use of the site is several times the seventy-two thousand dollars expended by the government for labor and materials.

¹ The 1968 Christmas Pageant for Peace Program (Government's Exhibit 1) indicates that personnel of the National Park Service and other federal agencies serve on the Executive Committee, Program Committee, Grounds & Facilities Committee, Military Participation Committee, Pageant Festival Committee and Seating Committee (App. pp. 32-3).

The government's contention that its expenses for the Pageant would be substantially the same, with or without the creche, is illusory and fallacious. Presumably, the same could be said as to each tree, each bench, each item of material or labor that is provided. The logical extension of this argument is that no cost is attributable to any aspect of the Pageant, and therefore the Pageant costs nothing. The answer to this argument is that the Pageant must be considered as a whole, of which whole the creche is part and parcel, and a primary focal point. It is perhaps no exaggeration to say that the entire Pageant is little more than a backdrop for the National Christmas Tree and the creche, and the cost of the whole must be considered in determining the monetary value of what is involved in the creche.

In the *Flast* case, *supra*, the Court based its determination that a substantial expenditure was involved on the total amount of the Elementary and Secondary Education Act appropriation (almost \$1,000,000,000), although only a tiny fraction of the appropriation was being challenged by the New York plaintiffs as improperly going to local sectarian schools. By the same logic, the over-all amount involved here is the total appropriation for the National Park Service, which for fiscal year 1969 was \$43,049,000.

By any standard of measurement, the plaintiffs submit, the amount and value of the federal expenditure is substantial.

C. The Challenged Expenditure is Being Made Under the Taxing and Spending Clause of Article Eight, Section One of the Constitution.

The government claims that the expenditures here challenged are being made under Art. I, § 8, Cl.17 and/or Art. IV, § 3, Cl.2, and not under Art. I, § 8, Cl.1, and therefore, plaintiffs fail to qualify for standing under the language of the *Flast* case. This argument cannot withstand close scrutiny.² The plaintiffs

² The government's argument, if carried to its logical conclusion, would mean that under the guise of exercising its authority under Art. I, § 8, Cl.17 and/or Art. IV, § 3, Cl.2, Congress

(Continued)

are not disputing whether the expenditures could have *also* been justified under the other clauses, but submit that in any event the expenditures were made pursuant to the authority granted by Art. I, § 8, Cl.1, and plaintiffs therefore have standing to complain under the *Flast* holding.

The government takes the position and plaintiffs agree, that the Taxing and Spending Clause of Art. I, § 8, Cl.1 confers a power separate and distinct from those later enumerated. The government, however, has no power to expend federal funds for any purpose which is not for the general welfare, and all government expenditures must be justifiable by that standard, whether or not they are more specifically authorized by some later clause. See, Dissenting Opinion of Harlan, J. in *Flast*, 392 U. S. at 118-9. Simply because the expenditures here challenged might also come within the scope of Art. I, § 8, Cl.17, or Art. IV, § 3, Cl.2, does not mean that the expenditure is not within the scope of the first clause of Section 8.

It is well-established that whatever added authority Clause 17 might lend, the power of Congress to tax and spend in and for the District of Columbia is derived from the first clause of Section 8.

As early as 1820, Chief Justice Marshall stated that:

"... [T]he right of congress to tax the district does not depend solely on the grant of exclusive legislation.

The 8th section of the 1st article gives to congress the 'power to lay and collect taxes, duties, imposts and excises,' for the purposes thereafter mentioned. The grant is general, without limitation to place." *Loughborough v. Blake*, 5 Wharton 317, 318; 18 U. S. 643, 644; See also, *Gibbons v. District of Columbia*, 116 U. S. 404 (1886), and *United States v. Butler*, 297 U. S. 1, 64.

² (Continued)

could make a gift to the Catholic Church in Washington of one million dollars to build churches or could establish federally funded religious schools in either the District of Columbia or in Yosemite Park. No one doubts that such expenditures would be clearly unconstitutional under the First Amendment, but under the government's theory, no taxpayer would have standing to complain.

It is doubtful whether Congressional authority over the District of Columbia under Art. I, § 8, Cl.17 underlies the source of the funds which support the Christmas Pageant of Peace. As is stated in the Affidavit of Russell E. Dickenson, the Ellipse is part of the National Capital Park System, which is a region of the National Park Service. The jurisdiction of the National Capital Park System, moreover, encompasses a geographic area larger than the physical limits of the District of Columbia, and includes parts of Maryland and Virginia. (36 C.F.R. 50.1, 4).

The authority of the National Capital Park System as part of the National Park Service must therefore be based on some authority other than or in addition to Art. I, § 8, Cl.17. It is conceded that both Art. I, § 8, Cl.17 and Art. IV, § 3, Cl.2 give Congress authority to tax and make expenditures for national parks within the District of Columbia. However, it is quite clear that federal expenditures for parks also come under Art. I, § 8, Cl.1. As was stated in *Yosemite Park v. Collins*, 20 F. Supp. 1009 (D.C.N.D. Cal. 1937):

"We do not believe that it can be denied that the federal government is here exercising a proper governmental function. Under *United States v. Butler*, [citations omitted], it could tax to raise money to buy parks under the 'general welfare' clause. Parks and recreational facilities clearly provide for the general welfare." 20 F. Supp. at 1013, *rev'd on other grounds*, 304 U. S. 518 (1938).

Having the authority to tax and expend for the acquisition of federal parks under Art. I, § 8, Cl.1, the government necessarily must have authority under the same clause to expend for the operation, maintenance and support of such parks.

The National Park Service is expressly authorized to perform numerous functions which are broader than the power conferred on Congress in Art. IV, § 3, Cl.2, but are within the more general authority under Art. I, § 8, Cl.1.³

³ The U. S. Government Organization Manual, 1969-70, states that: "This objective extends to the [National Park] Service's activities in the preservation of American antiquities, historic
(Continued)"

By virtue of the foregoing, the expenditure of funds for the Christmas Pageant of Peace is within the scope of Art. I, §8, Cl. 1. The fact that it may also be authorized under other clauses of the Constitution does not denigrate the fact that it is authorized under the Taxing and Spending Clause of Article One. Section 8, since it is made out of the overall National Park Service appropriation.⁴

The case relied upon by the government to support its position, *Velvel v. Nixon*, (U.S.C.A. 10th Cir., dec'd. 8/11/69), is clearly distinguishable from the case at bar. In *Velvel*, the appellant stated that his was not an action to challenge a federal taxing and spending program, while here plaintiffs are specifically challenging such a program. In *Velvel*, moreover, the appellant was apparently challenging an expenditure as being in violation of the war powers under Art. I, §8, Cl.11. The Court stated that this was a right for Congress and not a mere taxpayer to assert. Here, plaintiffs are basing their standing on an expenditure of funds under Art. I, §8, Cl.1, as limited by the Establishment Clause of the First Amendment.

Accordingly, plaintiffs submit that as federal taxpayers they have standing to challenge this expenditure, made under Art. I, §8, Cl. 1 of the Constitution, as being in violation of the Establishment Clause of the First Amendment.

³ (Continued)

and prehistoric sites and buildings, and properties of national historic or archeologic significance. A further objective of the Service is to provide assistance to the States in the management, operation, and development of public park and recreational area-facilities; and, through a grants-in-aid program, in the preservation, planning and acquisition and development of historic properties." Public Law 90-435 (82 Stat. 425-445), the Act which appropriates funds for the National Park Service, and from which the funds used for the Christmas Pageant for Peace are derived, contains expenditures for activities which do not come under the authority of either Art. I, §8, Cl.17 or Art. IV, §3, Cl.2, e.g., expenditures for the Geological Survey, Commission on Fine Arts, Bureau of Mines, Office of Saline Water, Foundation on the Arts and Humanities, and the Smithsonian Institution. Many of the above expenditures could only be authorized under Art. I, §8, Cl.1.

⁴ Surely the government will not contend that the expenditure of funds for this "officially recognized annual national celebration event" is not (at least ostensibly) intended to promote the "general welfare of the United States".

**D. Apart From Their Standing As Taxpayers,
Plaintiffs Have Standing Under the Free
Exercise Clause of the First Amendment.**

Four of the five plaintiffs are clergymen, and the fifth is an officer of the National Capital Humanist Association. All reside in the District of Columbia or in the metropolitan area. They allege in their Complaint and Affidavits that the governmental espousal of religion reflected in the erection of the creche constitutes, for differing reasons in each case, an infringement upon their personal freedom of religion.

The Supreme Court, in *Flast*, left open the question of whether a citizen, irrespective of his standing as a taxpayer, might challenge a federal expenditure on the Establishment Clause ground. (Concurring Opinion of Fortas, J., 392 U. S. at 115-16). The Court has, however, long recognized that persons whose free exercise of religion is abridged have standing to challenge the abridgement, without reference to their standing as taxpayers.

In *Engel v. Vitale*, 370 U. S. 421 (1961); *McCullum v. Board of Education*, 333 U. S. 203 (1947); and *Zorach v. Clauson*, 343 U. S. 306, the plaintiffs were parents of public school pupils whose free exercise of religion was allegedly infringed. In *Abington School District v. Schempp*, 374 U. S. 203, 224, the Court noted that, "The parties here are school children and their parents, who are directly affected by the laws and practices against which their complaints are directed. These interests surely suffice to give the parties standing to complain," and in his concurring opinion Justice Brennan observed that although no question of standing had been raised, "The free-exercise claims of the parents alleged injury sufficient to give them standing." 374 U. S. at 266 (n. 30).

In light of these authorities, and based on their allegations of infringement, the plaintiffs submit that they have standing to sue as aggrieved persons under the Free Exercise Clause, independently of their standing as taxpayers, to complain of the Establishment Clause violation.

II. THE COURT BELOW ERRED IN GRANTING THE GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT AND IN DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

The Pageant is "officially recognized" by the National Park Service as an "annual national celebration event". (Affidavit of Russell Dickenson, p. 1, App. p.). Pursuant to the permit issued July 31, 1969 to the Christmas Pageant for Peace, Inc., (Attachment B2 to government Exhibit 1, App. p.), preparations now underway will result in the installation and commencement of the fifteenth annual Christmas Pageant for Peace by December 10, 1969, App. p. . Giant mobile cranes will assist in erecting the National Christmas Tree, and with the aid of National Capital Park personnel, including laborers, electricians, painters and gardeners, trees will be set, platforms erected, electrical connections hooked up, and the setting for the creche made ready.

Although the permit for the pageant is issued nominally to the Christmas Pageant for Peace, Inc., the involvement of the National Park Service at both the supervisory and working levels, (See, Attachment A to government Exhibit 1, (App. pp. 30-33, *passim*), is so pervasive as to render the entire production a governmental activity, or at least a "quasi-governmental"⁵ activity. (See, recent decision of Leventhal, J., in *Women Strike for Peace v. Hickel*, U.S. App. D.C. No. 23,268, decided Aug. 1, 1969: "The Park Service affidavit . . . [which] identifies the Christmas Pageant program as a 'quasi-governmental activity' . . . may raise more questions than it answers." [p. 71]) Long before any part of the Pageant becomes visible to pedestrians on the Ellipse, the facilities will have been planned, the ground layout determined, and the program mapped out by committees chaired by or including National Capital Park personnel. All of this work

⁵ The vast participation of high federal officials in the planning and programming of the Pageant has elevated the Pageant to the stature of a national celebration and thereby invested the entire Pageant with a public character which renders it subject to the Bill of Rights. See, e.g., *Simpkins v. Moses H. Cone Memorial Hospital*, 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U. S. 938 (1964); *Burton v. Wilmington Parkway Authority*, 365 U. S. 715 (1961); *Smith v. Holiday Inns, Inc.*, 336 F.2d 630; *Poindexter v. Louisiana Financial Assistance Commission*, 275 F. Supp. 833 (E.D.La. 1967).

will have taken place under the direction of an Executive Committee, whose vice-chairman happens to be the Regional Director of the National Capital Region of the National Park Service (App. p.). On the basis of last year's program, it is likely that the Chairman of the Honorary Committee will be the Secretary of the Interior, and that this Committee will include all of the other cabinet officers, other second-echelon federal officials, and, among others, the Catholic Archbishop of Washington, the Episcopal Bishop of Washington, and perhaps one or two other Catholic or Protestant clergymen (App. pp. 31-2).

At the opening ceremonies, the invocation will be delivered by the Catholic Archbishop, and the closing benediction by the Episcopal Bishop, with a prayer by the Dean of the Greek Orthodox Cathedral inserted midway in the program. App. pp. 26-7. The various speeches will be interspersed throughout with "Christmas Selections" played by the United States Marine Band, and at the climax of the program, the audience of 10,000 will see President Nixon throw a switch illuminating the National Christmas Tree. (See Attachment A to government Exhibit 1, pp. 2-3, App. pp. 26-7).

A co-feature of the Pageant, and far superior to the National Tree in religious significance, if not in size, will be a floodlight-illuminated, lifesize replica of the stable at Bethlehem, with the Infant Jesus, surrounded by the Virgin Mary, St. Joseph, the oxen and asses, and adoring shepherds and Magi.⁶

⁶ The government cannot and does not deny that the creche is a religious symbol. The creche (or crib, as it is also called, See, Malloch, *A Practical Christian Dictionary*, p. 25), is explained in the Oxford Dictionary of the Christian Church as "By popular custom in the W. church, a representation of the crib (manger) in which Jesus was laid at His birth (Lk. 2.7) containing a model of the Holy Child, is placed on Christmas Eve (24 Dec.) in church, where it remains until the octave day of Epiphany (13 Jan.). Figures of the BVM [Blessed Virgin Mary] and St. Joseph, cattle, angels, and shepherds are usually included, and figures of the Magi are added on the Epiphany (6 Jan.). It is a "symbol" of our Lord's Nativity" (Webber, *Church Symbolism*, 72), and has "been used in church services from the first centuries" (Weiser, *Handbook of Christian Feasts and Customs*, 91). It is considered an object of devotion (4 New Catholic Encyclopedia 448) and "In Central Europe and in Latin countries the figure of the Christ Child in the manger is often carried to the altar rail by a priest after the midnight Mass and presented to the faithful for veneration. (3 New Catholic Encyclopedia for School and Home 326).

From mid-December up to and including New Year's Day, the creche will continue to be illuminated nightly and will be viewed by approximately 500,000 visitors and millions more on television (App. p. 42). The National Capital Park Service personnel and the National Capital Park Police will see to it that the Pageant runs smoothly. Approximately forty church and parochial school singing groups will perform during the concerts which will take place and end with a "prayer for peace" each evening (App. pp. 35-8), and at the end of the Pageant, carpenters and laborers from the National Park Service will dismantle the festival and seek to put the area back into its former condition. The books and records of the Park Service will show an identifiable outlay of about \$72,000.00, exclusive of police services, time and services of supervisory park personnel, and the value of the use of the site. Any expenses not paid by the National Park Service will be paid by the benevolent and public-spirited downtown merchants who comprise the Washington Board of Trade. (Attachment G-2 to government Exhibit 1, App. p. 48).⁷

This is unconstitutional. Whatever the constitutional status of the government's sponsorship of the Pageant might be in the absence of the creche (an issue which need not be decided in this case), the inclusion of the creche in these circumstances is a patent violation of the Establishment Clause of the First Amendment.

In an unbroken line of cases extending over two decades from the oft-quoted decision in *Everson v. Board of Education of Ewing Township*, 330 U. S. 1 (1946), the Supreme Court has continually reaffirmed the mandate of the Establishment Clause.

"The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another."
Everson, 330 U. S. at 15.

⁷ In his concurring opinion in *Engel v. Vitale*, *supra*, Justice Douglas paused to reflect that "Christmas, I suppose, is still a religious celebration, not merely a day put on the calendar for the benefit of merchants." 370 U. S. at 442.

Federal property is here being used to disseminate religious doctrine. The fact that the government is not directly erecting the creche but is "merely" permitting its erection does not vitiate the illegality of the action. The action of the officials in sanctioning and permitting a religious symbol to be displayed on federal tax-supported property is an establishment of religion. The Supreme Court has held that permitting religious instruction on tax-supported property is a violation of the Establishment Clause. *Illinois ex. rel. McCollum v. Board of Education*, 333 U. S. 203 (1948). In *Engel v. Vitale*, 370 U. S. 421 (1962), the Supreme Court, in holding unconstitutional the actions of the New York Board of Regents in recommending a prayer to be recited in schools, stated:

"When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain. But the purposes underlying the Establishment Clause go much further than that. Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion. The history of governmentally established religion, both in England and in this country, showed that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs. That same history showed that many people had lost their respect for any religion that had relied upon the support of government to spread its faith. The Establishment Clause stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its unhallowed perversion by a civil magistrate." (emphasis added) 370 U. S. at 431-32.

In the *Everson* and *McCollum* cases, *supra*, and also in *Torcaso v. Watkins*, 367 U. S. 488 (1961), the Supreme Court defined the meaning of the Establishment Clause in the following terms:

"The 'establishment of religion' clause of the First Amendment means at least this: neither a state nor the federal government can set up a church, neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can

force nor influence a person to go or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. *Neither a state nor the federal government, can, openly or secretly, participate in the affairs of any religious organization or groups or vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and state.'*" (emphasis added) *Everson, supra*, 330 U.S. at 15, 16.

Measured by the standards of this paragraph, it is apparent that the erection and maintenance of the creche on the Ellipse violates the Establishment Clause of the First Amendment. It is clearly an aid to one religion—the Christian religion—and prefers that religion to other religions.

The government cannot validly argue that the "mere" permitting of a symbolic expression of religion by the government does not amount to an "establishment" of religion.

"As we have indicated, the establishment clause has been directly considered by this Court eight times in the past score of years, and with only one Justice dissenting on this point, it has consistently held that the clause withdrew all legislative power respecting religious belief *or the expression thereof*." (emphasis added) *School District of Abington Township v. Schemp, supra*.

And the expression, we submit, can be by symbols as well as by words, as the Supreme Court has consistently held. *Stromberg v. California*, 283 U. S. 359 (1931) (red flag); *Minersville School District v. Gobitis*, 310 U. S. 586 (1940) (American flag); *West Virginia State Board of Education v. Barnett*, 319 U. S. 624 (1943) (American flag).

Directly in point is a very recent case from the Supreme Court of Oregon holding unconstitutional the use of public park land for the erection and maintenance of a Latin cross by private interests. *Lowe v. City of Eugene*, ___ Ore.

___, ___ P.2d ___, (Oct. 1969). In that case, as in the present case, plaintiffs brought a declaratory judgment challenging the constitutionality of the cross, and named as defendants the City of Eugene, which had issued the building permit, and the Eugene Sand & Gravel, Inc., which had erected the cross. As in the present case, the defendants in the *Lowe* case sought to defend the cross as an expression of cultural tradition rather than a religious symbol. After an extensive trial, the Trial Court handed down its written opinion in which it held that the cross was primarily a religious symbol and "only secondarily a memorial of or a monument to a vitally significant value system in the life and history of our nation and this community." (Decision of Trial Court, quoted in 451 P.2d 117 at 119.)

On appeal, the Supreme Court of Oregon reversed the decision of the Trial Court in a four to three decision. *Lowe v. City of Eugene*, ___ Ore. ___, 451 P.2d 117. Upon rehearing, the Supreme Court of Oregon reversed itself, affirmed the decision of the Trial Court, and adopted as the opinion of the Supreme Court what had been the dissenting opinion in the earlier decision (App. pp. 54-9). The following excerpts from the earlier decision, which was endorsed by the majority upon rehearing, is, plaintiffs submit, directly in point in the case at bar:

The display of the lighted cross during Christian festivals is at least concurrently a religious activity, even if one were to accept the somewhat labored argument of the proponents of the cross that the true motive for the display has been secular, i.e., the commercial exploitation of religious holidays. . . .

Turning to our state constitution, and given the majority's acknowledgment that the cross display is that of a religious symbol, there is further reason to rebuke the city council. Government has no more right to place a public park at the disposal of the majority for a popular religious display than it would have, in response to a referendum vote, to put the lighted cross on the city hall steeple. The whole point of separation of church and state in a pluralistic society is to keep the majority from using its coercive power to obtain governmental aid for or against sectarian religious observances. See *Dickman et al. v. School Dist. No. 62C et al.*, 232 Or. 238, 246-247, 366 P.2d 533, 93 A.L.R.2d 969 (1961), cert. denied, 371 U. S. 823, 83 S.Ct. 41, 9 L.Ed.2d 62 (1962).

Finally, I do not believe the difficult constitutional question is one that can be evaded by trivialization. The cross does not occupy a large tract of land, but it is permanent and it is conspicuous. Whether so intended by the city council or not, the city's participation in the display has placed the city officially and visibly on record in support of those who sought government sponsorship for their religious display. 451 P.2d 117, 124.

In *Abington School District v. Schempp*, 374 U. S. 203 (1963), the Supreme Court struck down the practice of Bible-reading in schools as being "in violation of the command of the First Amendment that the government maintain strict neutrality, neither aiding nor opposing religion." 374 U. S. at 225. In so holding, the Court laid down the following rationale and guide:

"The wholesome 'neutrality' of which this Court's cases speak thus stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that *official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies. This the Establishment Clause prohibits.* And a further reason for neutrality is found in the Free Exercise Clause, which recognizes the value of religious training, teaching and observance, and, more particularly, the right of every person to freely choose his own course with reference thereto, free of any compulsion from the state. This the Free Exercise Clause guarantees. Thus, as we have seen, the two clauses may overlap. As we have indicated, the Establishment Clause has been directly considered by *this Court* eight times in the past score of years and, with only one Justice dissenting on the point, *it has consistently held that the clause withdrew all legislative power respecting religious belief or the expression thereof. The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution.* That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." (emphasis added) 374 U. S. at 222.

In its open sponsorship, both money-wise and prestige-wise, of the Pageant, of which the creche is an integral part, the government has placed its "official support . . . behind the tenets" of Christianity, in direct violation of the prescription set forth in *Schempp*.

Applying the "purpose and primary effect" test, as the government agrees we must, the creche—by admission of its sponsors—is seen to be in violation. In its program for 1968, (Attachment A to government Exhibit 1, App. p. 24), the sponsors of the Pageant declare the overall aim of the Pageant as being "to express this Nation's desire for Peace on Earth to Men of Goodwill." Further on, the specific purposes of some of the constituent elements are explained. Thus, the eight reindeer are intended to convey "the festive, happy meaning of Christmas," while the purpose of the life-sized Nativity Scene is to represent "the spiritual meaning of Christmas."

"Spiritual," according to Webster, can mean ". . . of or pertaining to sacred things or the church." (New International Unabridged, 2nd Ed.) When as basic a religious symbol as the creche is concerned, there is no plausible alternative—nor does the government suggest any—to concluding that "spiritual" is synonymous with "religious".

But there is no need to belabor the point. The government concedes that the purpose of including the creche display in the Pageant is "to represent the religious heritage aspect of our celebration of Christmas as a national holiday." (App. p. 17).

Similarly, if we ask, "What is the 'primary effect' of 'the creche'?", there can be no serious question but that in the setting in which it is offered, its primary effect is to "advance religion," within the terms of *Schempp*. Admittedly, the creche may also be productive of a pleasing aesthetic effect for some, or a mood of humbling meditation for others, but its *primary* effect is certainly religious. By its sponsorship and pervasive participation, the government has placed its official support behind one of the basic tenets of Christianity.

The government does not deny, and, indeed, has by its conduct before this case arose implicitly admitted that the creche is primarily and essentially a religious symbol. In 1968, when the American Civil Liberties Union first voiced its complaint, the National Capital Park Service, under the Regional Directorship of Mr. Nash Castro, swiftly changed its prior policy and announced that henceforth it would not be involved "... in the sotrage, maintenance, repair, erection or disassemblment" of the creche, and that the non-federal membership of the Christmas Pageant of Peace, Inc. would henceforth assume these duties. (Attachment F to government Exhibit 1, App. p. 46). This abrupt change, plaintiffs contend, was an implicit admission that the prior practice was unlawful, and was a transparent but ineffectual attempt to cure the violation. The "change" claimed by Mr. Castro was quite illusory, since the person who held the posts of Vice-President of the Christmas Pageant for Peace, Inc., Vice-Chairman of the Pageant's Executive Committee, and Secretary of the Pageant's Honorary Committee was none other than ... Mr. Nash Castro. (Attachment A to government's Exhibit 1, App. p. 32). The government's extensive involvement in the Pageant as a whole, regardless of whose laborers set up or dismantle the creche itself, continues unabated.

As the plaintiffs have argued at length, *supra*, pp. 9-10, the government's financial contribution to the Pageant, of which the creche is an integral part, is substantial. The government disputes this fact and contends that the government involvement with the creche is so slight as to fall within the rule of *de minimis*. Even if the government were right, however, in saying that the government's support of religion as here represented is minimal, this would clearly afford no defense. As Justice Clark stated in delivering the Opinion of the Court in the *Schempp* case, which the government concedes is controlling:

"Further, it is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, 'it is proper to take alarm at the first experiment on our liberties.' 'Memorial and Remonstrance Against Religious Assessments,' quoted in *Everson*, *supra*, at 65." *Schempp*, 374 U. S. at 225.

That the parcel of land on which the creche is erected is relatively small is, of course, immaterial. The *de minimis* argument was made and rejected by the Supreme Court in the *Engel* case, *supra*. There, the Court said:

"It is true that New York's establishment of its Regents Prayer as an officially approved religious doctrine of the State does not amount to a total establishment of one particular religious sect to the exclusion of all others—that, indeed, the governmental endorsement of that prayer seems relatively insignificant when compared to the governmental encroachments upon religion which were commonplace two hundred years ago. To those who may subscribe to the view that because the Regents Official Prayer is so brief and general that there can be no danger to religious freedom in its governmental establishment, however, it may be appropriate to say in the words of James Madison, the author of the First Amendment:

"It is proper to take alarm at the first experiment on our liberties . . . Who does not see that the same authority which can establish Christianity in exclusion of all other religions, may establish with the same ease any particular sect of Christians, in exclusion of all other sects? That the same authority which can force a citizen to contribute threepence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?" 370 U. S. at 436.

The basic principle here involved was clearly articulated in *Everson v. Board of Education of Ewing Township*, *supra*, as follows:

"No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups or vice versa." 330 U. S. at 16.

The *de minimis* argument is patently untenable. If defendants can constitutionally maintain a creche on the Ellipse for fifteen days, then why not a crucifix at the entrance to each National park—and in every post office and federal courtroom—all year long? Could such action be constitutionally justified

by having some private organization furnish and install the religious symbolry at no cost to the government? The question answers itself. As countless Supreme Court Justices have reminded us since Madison first articulated the point, the smallest breach in the wall of neutrality cannot be tolerated, lest the permitted crack widen uncontrollably.

"Such contributions [of funds or facilities in aid of religion] may not be made by the State even in a minor degree without violating the Establishment Clause. It is not the amount of public funds expended; as this case illustrates, it is the use to which public funds are put that is controlling. For the First Amendment does not say that some forms of establishment are allowed; it says that 'no law respecting an establishment of religion' shall be made. What may not be done directly may not be done indirectly lest the Establishment Clause become a mockery." Douglas, J. concurring in Schempp, 374 U. S. at 230.

In Justice Brennan's concurring opinion in *Schempp*, he expresses the same view, in a passage which also disposes of the defense suggested by Mr. Carr's attempted justification of the creche from the fact that he has not received any letters of complaint (App. p. 42):

"[In Engel v. Vitale] New York, in authorizing [the state-composed Regent's Prayer] recitation, had not maintained that distance between the public and the religious sectors commanded by the Establishment Clause when it placed the 'power, prestige and financial support of government' behind the prayer. In Engel, as in McCollum, it did not matter that the amount of time and expense allocated to the daily recitation was small so long as the exercise itself was manifestly religious. Nor did it matter that few children had complained of the practice, for the measure of the seriousness of a breach of the Establishment Clause has never been thought to be the number of people who complaint of it." 374 U. S. at 264.

The precise issue raised in this case appears to be a matter of first impression in the federal courts. Although the Supreme Court in *McCollum*, *Engel* and *Schempp* struck down the use of school property for prayer-reading or religious instruction, that Court has not yet had occasion to consider the

use of government funds and lands for religious purposes outside of the academic field. Plaintiffs contend, however, that proper application of the guidelines enunciated in the prior cases supports—and, indeed,—requires the entry of summary judgment on the undisputed facts of this case. The issue here, plaintiffs contend, is precisely described in the following excerpt from the concurring opinion of Justice Douglas in *Schempp*, appropos of Bible-reading in the Pennsylvania schools:

“... [t]he Establishment Clause is not limited to precluding the State itself from conducting religious exercises. It also forbids the State to employ its facilities or funds in a way that gives any church, or all churches, greater strength in our society that it would have by relying on its members alone. Thus, the present regimes must fall under that clause for the additional reason that public funds, though small in amount, are being used to promote a religious exercise. Through the mechanism of the State, all of the people are being required to finance a religious exercise that only some of the people want and that violates the sensibilities of others.” 374 U. S. at 229.

CONCLUSION

For the reasons stated, the Order of the Trial Court granting the defendants' Motion to Dismiss, or, in the alternative, granting the defendants' Motion for Summary Judgment, and denying the plaintiffs' Motion for Summary Judgment, should be reversed, and the cause remanded for the entry of judgment for the plaintiffs.

Respectfully submitted,

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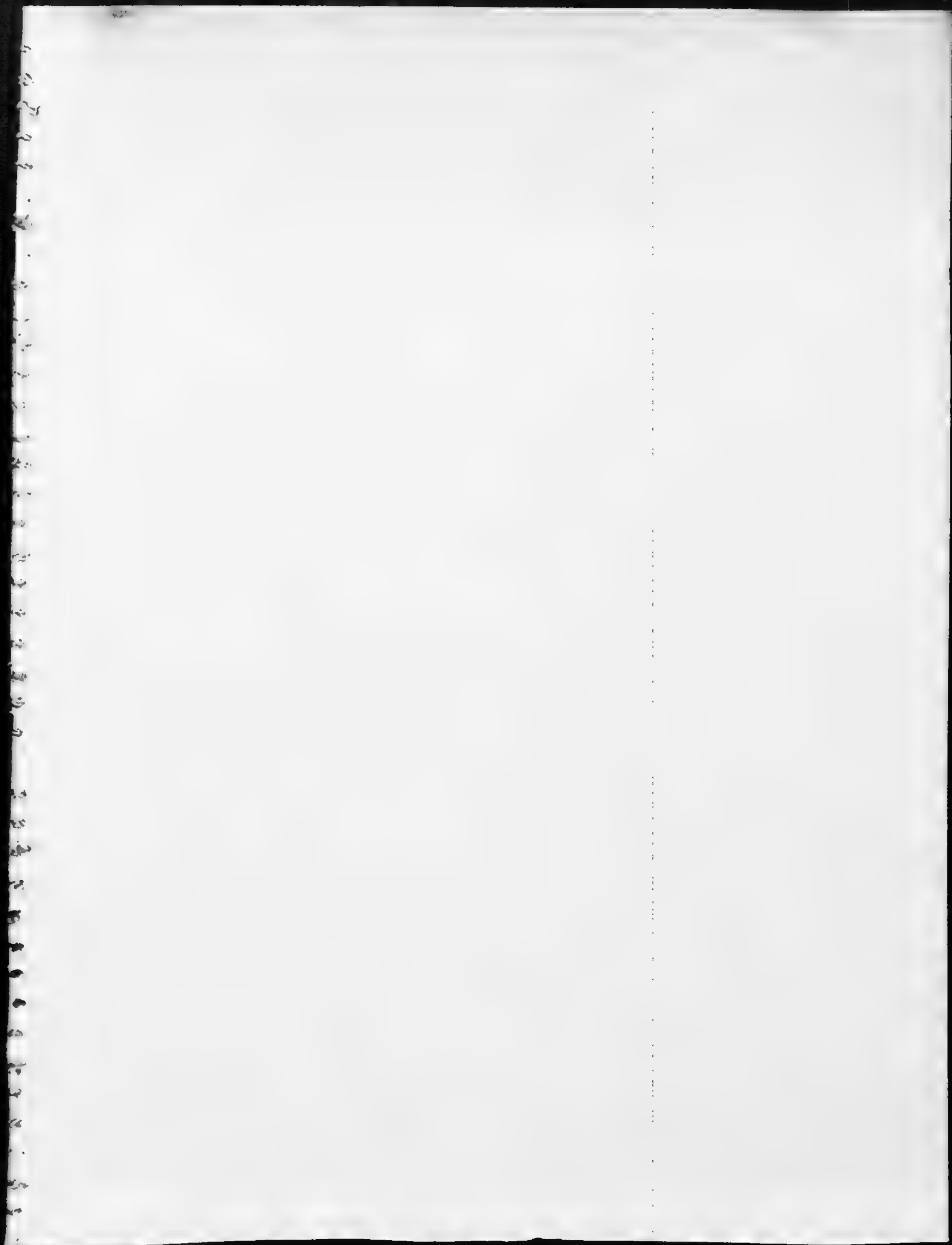
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United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Appellants,

v.

WALTER J. HICKEL
Secretary of the Interior, *et al.*,

Appellees.

APPELLANTS' REPLY BRIEF

United States Court of Appeals
for the District of Columbia Circuit

FILED DEC 2 1969

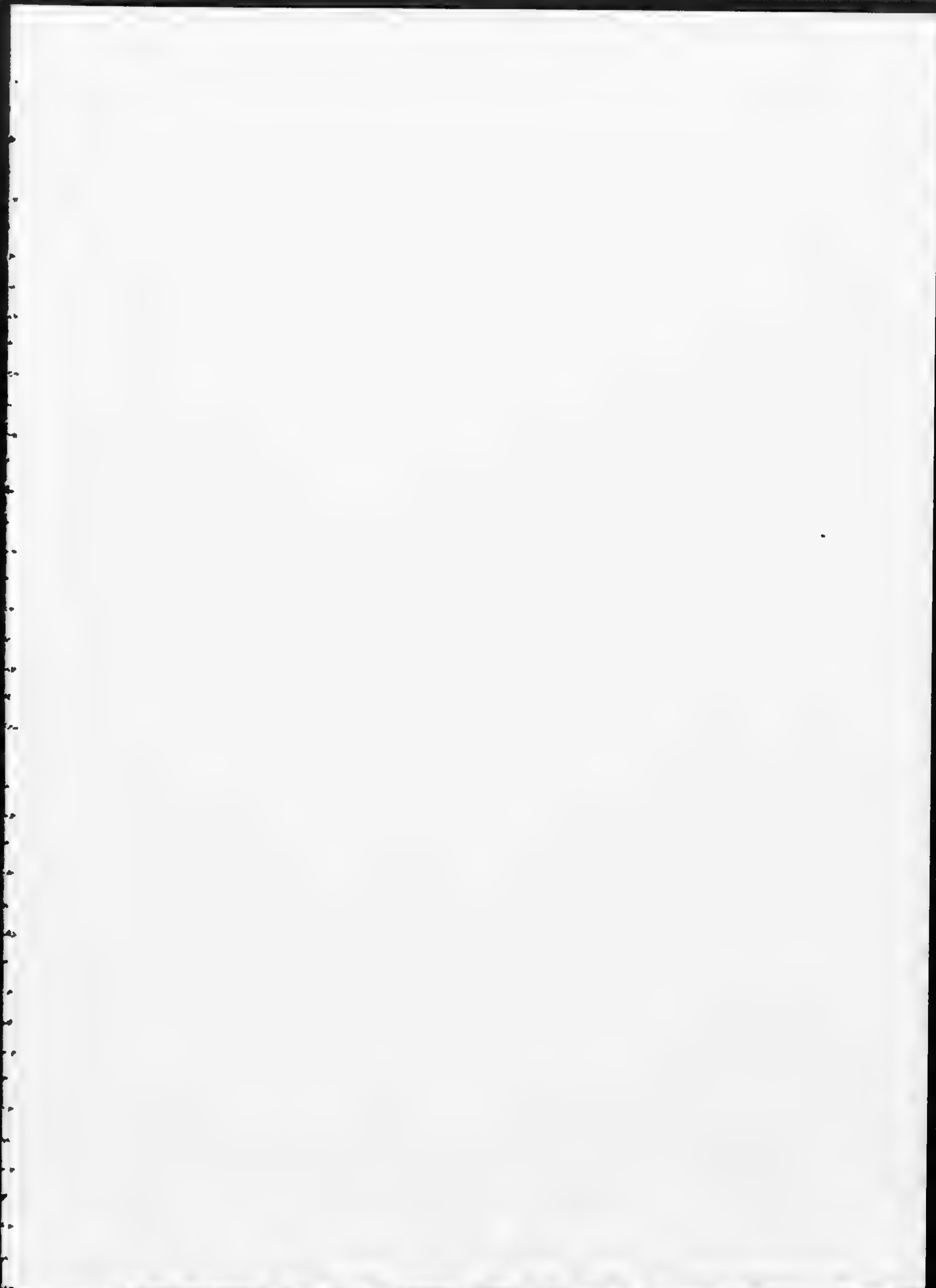
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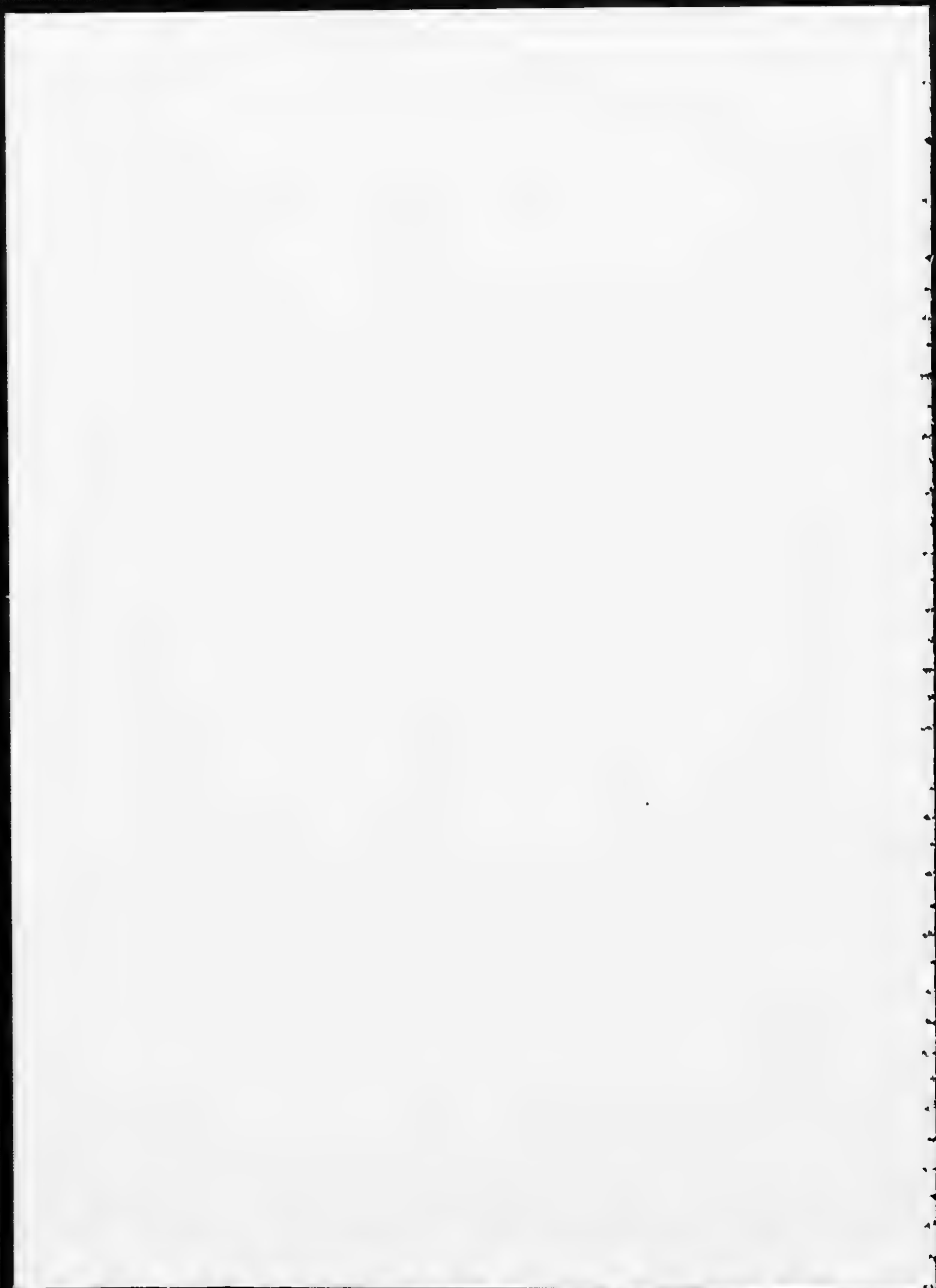
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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

REVEREND THOMAS B. ALLEN, *et al.*,

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Appellees.

APPELLANTS' REPLY BRIEF

I. APPELLANTS HAVE A SUFFICIENT PERSONAL INTEREST IN THE SUBJECT MATTER TO CONFER STANDING TO SUE, INDEPENDENTLY OF THEIR STANDING AS TAXPAYERS.

The "gist of the question of standing" is whether the party seeking relief has "alleged such a personal stake in the outcome" as to ensure adequate presentation of the issues. *Baker v. Carr*, 369 U.S. 186, 204 (1962). The requisite personal stake may be found to arise in various ways. The appellants have argued in their brief that they have the requisite personal stake by virtue of their status as taxpayers, under the guidelines of *Flast v. Cohen*, 392 U.S. 83 (1968).

In addition to, and independently of their standing as taxpayers, however, appellants claim standing to challenge the activities complained of because of the ways in which those activities touch them personally and professionally.

The appellants all live and work in the District of Columbia or the metropolitan Washington area. As such, they are members of the local general public which is entitled to and can reasonably be expected to make use of the Ellipse for such leisure and recreational purposes as public parklands are intended. They should not have to shun or avoid the Ellipse area during the period of December 10th through January 2nd, because there is then and there erected a religious symbol which they find offensive.

More significantly, each of the appellants is himself a leader of some religious or atheistic group. As clergymen and religious leaders, appellants have a further interest in protecting the rights and interests of their respective congregations. It is, indeed, difficult to imagine a group of plaintiffs who have a more direct and immediate stake in religious activities conducted on the Ellipse than Washington-area clergymen. Such an interest is directly analogous to that of parents in the schooling of their children, which the Supreme Court has on several occasions recognized as adequate to confer standing to challenge the constitutionality of government action. *Abington School District v. Schemp*, 374 U.S. 203, 244, 266 (1962) *Engel v. Vitale*, 370 U.S. 421 (1961) *McCullum v. Board of Education*, 333 U.S. 203 (1947).

Appellants, in their Complaint and Affidavits, have alleged that their free exercise of religion has been infringed as a result of the challenged activity, and that the erection and maintenance of the creche in a government sponsored and subsidized celebration has an unwelcome, coercive and intimidating upon them—non-Christians and Christians alike.

The government has failed to traverse these Affidavits, and for purposes of the Motions for Summary Judgment, the allegations must be taken as true. Rule 56(c), Federal Rules of Civil Procedure. Appellants contend that these uncontroverted allegations have a dual legal significance: they confer an

independent basis for standing; and they establish a prima facie case on the merits of appellants' claimed violation of the Free Exercise Clause of the First Amendment.

The sufficiency of these undisputed facts for establishing appellants' claim under the Free Exercise Clause was succinctly articulated by Justice Black in *Engel v. Vitale*, *supra*:

"When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."
370 U.S. at 431.

II. THE PURPOSE AND PRIMARY EFFECT OF THE CRECHE IS RELIGIOUS

The government's argument on the merits of the Establishment Clause claim tends to obscure the fundamental question: Are either the purpose or the primary effect of the creche religious in nature?

The government seeks to avoid the issue by talking instead about the purpose and primary effect of the Pageant as a whole. (Appellees' Brief, pp. _____ to _____, *passim*) The government's argument seems to presuppose that if it can establish that the purpose and primary effect of the Pageant as a whole is not religious, then the purpose and primary effect of the creche is irrelevant.

This argument would suggest that permitting religious instructors to teach for an hour or so each week in the public schools, or permitting the reading of school prayers or the Bible each day in public classrooms, is justifiable since the overall purpose and primary effect of operating the public schools is clearly secular—the advancement of education. Such an argument, of course, was made and rejected in the *McCormack*, *Engel* and *Schemp* cases, *supra*.

Clearly, the proper question is whether or not the purpose or primary effect of the *creche* is religious, and equally clearly, the answer is in the affirmative.

The government has admitted and does not now deny that the purpose of the inclusion of the *creche* is to represent the religious aspect of Christmas. There can be little doubt, moreover, that the primary effect of the *creche* is likewise a religious one. In a remarkable display of semantic obfuscation, the the government makes the naked assertion, quite devoid of any support in the record, that the *creche* depiction of the birth of Christ represents, "secular recognition of the Christian religious heritage aspect" of Christmas. (Appellees' Brief, p. _____)

Such obvious double-talk reflects the government's understandable inability to seriously suggest that the primary effect of the *creche* display is anything but religious. This effect is determined in large part by the setting. While the primary effect of a similar display in—say, a museum exhibit on comparative religious practices might be secular, there can be no denying the essentially religious effect of the spotlighted nativity scene for the thousands of beholders who come to the Ellipse during the Christmas season to gaze upon the *creche* amid the strains of Christmas carols being rendered by local church singing groups in the background.¹

The government's argument that it is using a religious symbol to achieve a secular purpose and serve secular ends was made, and rejected by the U.S. Supreme Court, in *Schemp, supra*.

"The second justification assumes that religious exercises at the start of the school day may directly serve solely

¹ The *creche* on the Ellipse is thus distinguishable from the statue of Moses holding the ten commandments, which is mounted beside a statue of Hammurabi in the ceremonial courtroom of the U.S. District Court. No one could plausibly argue that the primary effect of the latter display is religious, or that the primary effect of the former is not.

secular ends — for example, by fostering harmony and tolerance among the pupils, enhancing the authority of the teacher, and inspiring better discipline I have previously suggested that *Torcaso* and the *Sunday Law Cases* forbid the use of religious means to achieve secular ends when non-religious means will suffice. That principle is readily applied to these cases While I do not question the judgment of experienced educators that the challenged practices may well achieve valuable secular ends, it seems to me that the state acts unconstitutionally if it either sets about to attain even indirectly religious ends by religious means, or if it uses religious means to serve secular ends when secular means would suffice.” Concurring Opinion of Brennan, J., *Abington School District v. Schemp*, 384 U.S. at 280-1.

Under the *Schemp* test, if *either* the purpose *or* primary effect of the challenged activity is to aid or advance religion, the First Amendment has been violated. Appellants here contend that the government sponsorship of the creche fails the test of constitutionality under *both* tests.

III. THE GOVERNMENT'S FORMAL CO-SPONSORSHIP OF THE PAGEANT UNDERSCORES THE VIOLATION OF THE ESTABLISHMENT CLAUSE.

In a startling change of policy since this case was argued in the District Court, the government has become an official co-sponsor of the Pageant. This change (Appellees Brief, p.), was occasioned by the decision of this Court in *Women's Strike for Peace v. Hickel*, C.A. No. 23,268, decided August 1, 1969, and makes official what was previously an inferred conclusion — i.e., that the government's pervasive participation in the Pageant rendered the entire Pageant a kind of “state action”.

Perhaps even more intriguing than the new role of the National Park Service as co-sponsor of the Pageant (a maneuver apparently dictated by the desire of the National Park Service to justify refusal of a permit for the use of the Ellipse to the Women's Strike for Peace) is the pious disclaimer of the Service of any involvement in the erection, dismantling and storage of the creche. All of these

arrangements, we are told, will be handled by the Christmas Pageant for Peace, Inc.

Appellants wonder how the National Park Service plans to apply or inform the public of its policy of non-involvement in the creche. Will its carpenters, electricians, laborers and other maintenance personnel, along with the Park Police, not render the same services in the area of the creche as they will in the other areas of the Ellipse? Surely, they will. Will the Service require the Christmas Pageant for Peace, Inc. to pay rent and provide insurance covering the piece of ground on which the creche is erected? Surely, it will not. Will the Service cause to be printed in the program or posted on the creche display itself a notice that it is not involved in erecting or dismantling the creche? More, to the point, can the government seriously suggest that any such disclaimer would be effective to divorce the Service from a basic element of the Pageant which it sponsors?

An argument similar to that which the government is here making was made in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). In that case, a privately leased restaurant, located in a publicly-owned and operated automobile parking building, refused to serve the plaintiff Burton food or drink solely because he was a Negro. The Supreme Court of Delaware held that Burton was not entitled to relief, on the ground that the restaurateur's action was not state action within the meaning of the Fourteenth Amendment. On certiorari, the U. S. Supreme Court reversed on the ground that the state's ownership and maintenance of the building

"together with the obvious fact that the restaurant is operated as an integral part of a public building devoted to a public parking service, indicates that degree of state participation and involvement in discriminatory action which it was the design of the Fourteenth Amendment to condemn."
Ibid. at 724.

In the case at bar, the government's position is, of course, much weaker than in *Burton*. In the latter case, the government could point to a lease

representing an arm's length financial relationship with the private restaurateur; whereas in the case at bar, the government is co-sponsoring the Pageant and making no charge for the use of public property, including the property on which the creche is erected.

The National Park Service's disavowal of responsibility for the creche and the transfer of responsibility for its maintenance should be recognized and treated for what it is — a blatant attempt to evade the prohibition of the Establishment Clause by disguising what is for all practical purposes government action in the raiment of private conduct. This crude attempt to do indirectly that which may not be done directly is unworthy of the National Park Service, and the facade of private action which they have sought to here erect over the creche should be cast aside.

Respectfully submitted,

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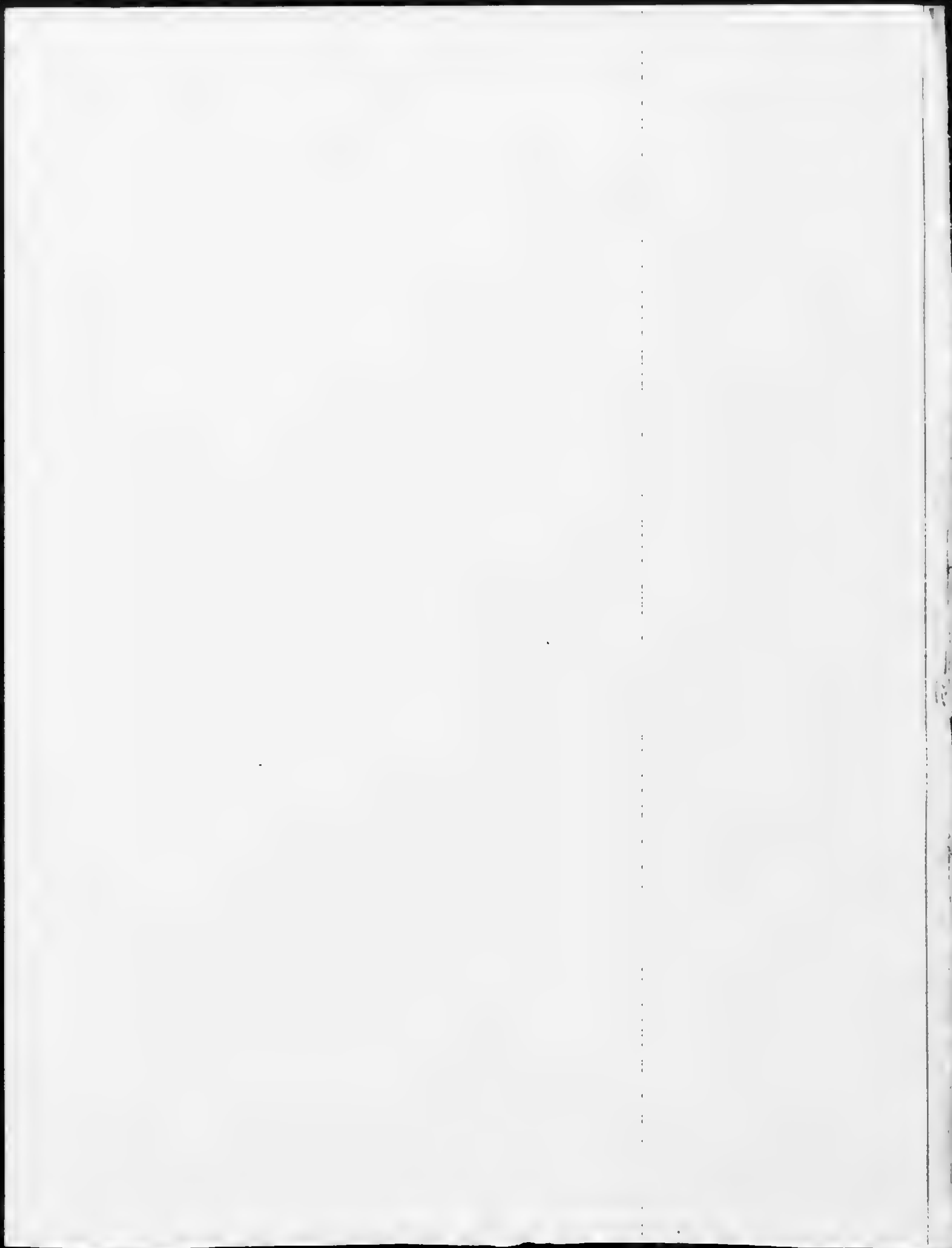
CERTIFICATE OF SERVICE

I hereby certify that I have this 26th day of November, 1969, sent a copy of the typewritten reply brief for appellants in the above-entitled case by official United States mail to the attorney for appellees addressed as follows:

Gil Zimmerman
Assistant U.S. Attorney
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Washington, D.C. 20001

I also hereby certify that I have this date sent a typewritten copy of the reply brief to the printer and that no changes in the brief to be filed in printed form will be made, except for minor changes or corrections.

WARREN K. KAPLAN
Attorney for Appellants



UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Case No. 23544

REVERENT THOMAS B. ALLEN, et al.,

Appellants,

v.

WALTER J. HICKEL, Secretary of
the Interior, et al.,

Appellees.

BRIEF OF THE AMERICAN JEWISH CONGRESS, AMICUS CURIAE

United States Court of Appeals
for the District of Columbia Circuit

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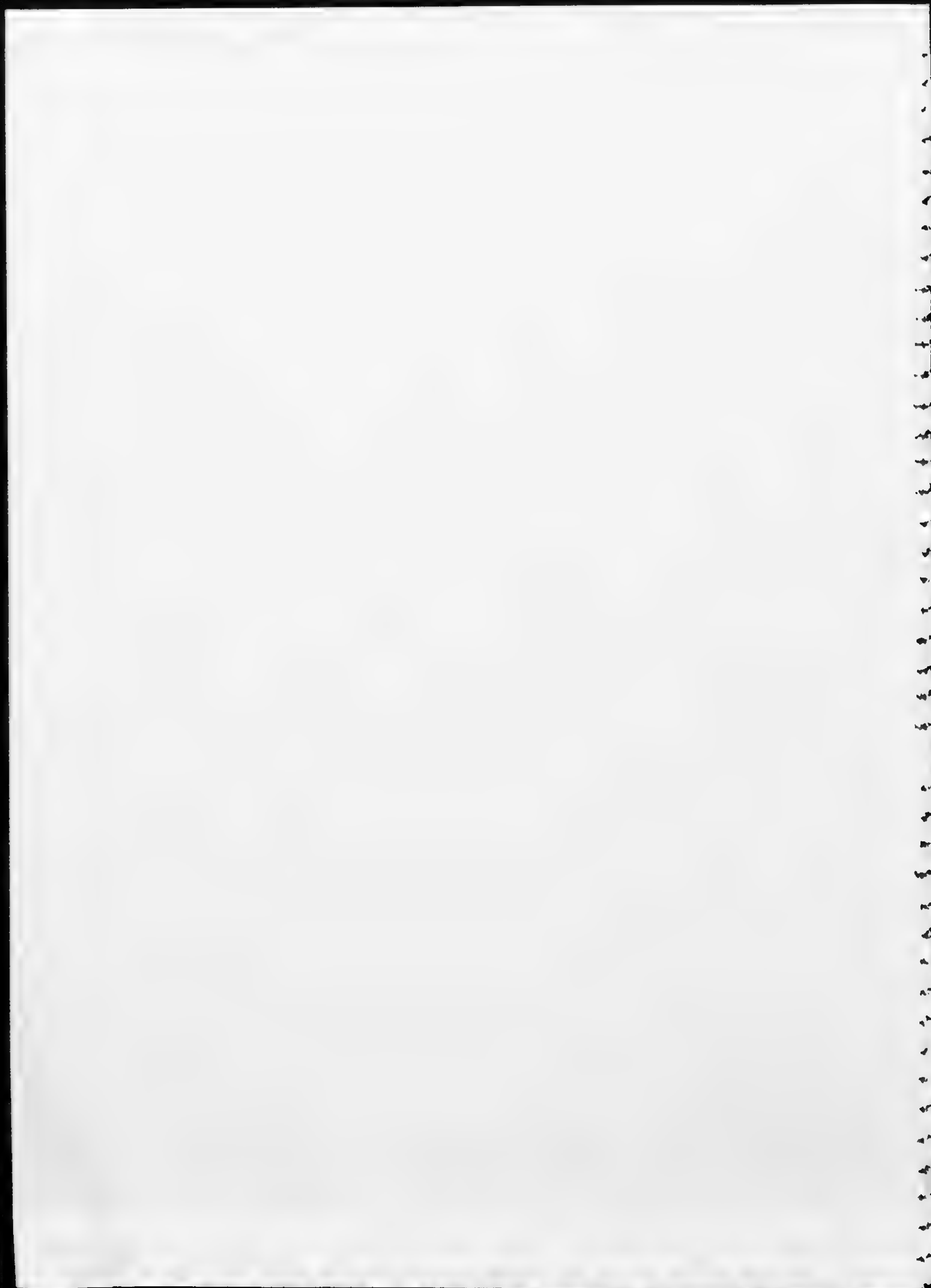
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UNITED STATES COURT OF APPEALS
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Case No. 23544

BRIEF OF THE AMERICAN JEWISH CONGRESS,
AMICUS CURIAE

The American Jewish Congress respectfully submits this brief, as amicus curiae, in support of the appellants. The interest of the American Jewish Congress in the constitutional issue raised by this case is set forth in the motion for leave to file a brief amicus curiae annexed hereto.

Statement of the Case

This Court is asked in this case to consider the constitutionality of an annual display on Federal property of a Creche, a recognized symbol of the Christian faith, as part of a Christmas Pageant of Peace. The plaintiffs in the case, including four clergymen of various persuasions, seek a declaration that the appropriation of Federal funds and permission to use Federal land for erection and maintenance of the Creche violate the First Amendment. Plaintiffs also seek to enjoin the erection of the Creche for the 1969 Christmas season.

The Federal land here involved is a part of the parcel of Government land in Washington, D. C. known as the Ellipse. The defendant Government

officials (the Secretary of Interior, the Regional Director of the National Park Service and the Superintendent of the National Capital Park Central) have permitted a non-profit civic organization to use the land for the purpose of conducting an annual Christmas Pageant. One of the features of the Pageant is a life-sized, flood-lighted Nativity Scene or Creche, which is indisputably a symbol of the Christian faith. The complaint further alleges that financial assistance toward the erection and maintenance of the Creche is provided by the Federal Government. Without challenging other aspects of the Pageant, the plaintiffs seek relief only as to the Creche.

The Government, through the defendants in this case, asserts that no substantial amount of Federal funds will be expended for the Creche as part of the 1969 Christmas Pageant event.* It filed a motion to dismiss the action on the ground that the plaintiffs had no standing to bring this action. It also moved alternatively for summary judgment on the merits.

At the conclusion of the argument on the motions, the United States District Court for the District of Columbia granted the Government's motion to dismiss. No opinion was filed. The order subsequently issued granted the motion to dismiss on the ground that the plaintiffs lacked standing to sue but stated, in the alternative, that the court would sustain the defendants' motion for judgment on the merits.

*It appears that in 1968 the Government spent \$72,789 for labor and materials for the entire Pageant, not counting the time spent by Government officials in planning and administration. (Defendants' Memorandum in the court below in support of the Motion to Dismiss, hereinafter referred to as Defendants' Memorandum, p. 4). It is the Government's contention that only a small part of the total expenditure can be attributed to the Creche (ibid).

Question to Which This Brief is Addressed

As amicus, we support the contention of the plaintiffs that they have standing as taxpayers to contest the support to religion accorded by the Federal Government through the Creche display. Our brief, however, is addressed to the substantive question:

May the Federal Government under the strictures of the Establishment Clause of the First Amendment donate Federal land for the display of a recognized religious symbol and appropriate funds for its erection and maintenance?

A R G U M E N T

THE DISPLAY OF A CRECHE ON FEDERAL LAND, PARTICULARLY WITH FEDERAL FINANCIAL ASSISTANCE, CONSTITUTES RELIGIOUS PROSELYTIZING AND SUPPORT OF RELIGION WHICH VIOLATE THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT.

A. The Requirement of Reciprocal Non-intervention by Church and Government is Infringed When an Agency of the State is Made into An Instrument to Support Religious Doctrine.

In the now classic formulation of the reach of the Establishment Clause, the Supreme Court declared in Everson v. Board of Education, 330 U.S. 1, 15-16 (1947):

... Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. ... No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. ... In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State."

The meaning of these strictures is unmistakable. The First Amendment requires not only severance of the state from a particular church but also severance of the state from all churches and all activities in aid of religion.

This broad view of the Establishment Clause has been repeated and strongly reaffirmed in subsequent cases. McCullum v. Board of Education, 330 U.S. 201,

210-11 (1948); Torcaso v. Watkins, 367 U. S. 488, 492-3 (1961); McGowan v. Maryland, 366 U. S. 420, 442-3 (1961). In Abington School District v. Schempp, 374 U. S. 203, 222 (1963), the Court noted that the Establishment Clause had been considered by the Court eight times within the past score of years and added: "with only one Justice dissenting on this point, it [the Court] has consistently held that the clause withdraws all legislative power respecting religious belief or the expression thereof."

One of the arguments stated by Madison in his Memorial and Remonstrance Against Religious Assessments in opposition to taxation for religious purposes was that Government's employment of "Religion as an engine of Civil policy *** [is] an unhallowed perversion of the means of salvation." II WRITINGS OF MADISON 183, 185-186. A great statesman and jurist, Jeremiah S. Black, stated that the fathers of our Constitution "built up a wall of complete and perfect partition" between church and state in order that "one should never be used as an engine for the purposes of the other." Black, Essays and Speeches 53 (1885). Similarly, Justice Frankfurter, in both his concurring opinion in the McCullum case, supra (333 U. S. at 232), and in his dissenting opinion in the Everson case, supra (330 U. S. at 59), said: "We have staked the very existence of our country on the faith that complete separation between the state and religion is best for the state and best for religion."

Thus, Government is under an obligation not to participate in religious activities even when it does so impartially and on behalf of all religions alike. A fortiori, it violates the constitutional command when it lends its support and prestige to the message of a particular religious group. Such activity by the state constitutes a proscribed form of aid to religion and the promulgation of particular religious teachings.

The amount of financial support provided by the Federal Government for the erection and maintenance of the Creche here involved is in dispute -- a dispute not resolved by the court below. The fact of such support, however, is not questioned. We urge below that application of the de minimis concept is out of place where the principle of separation is invoked. It is further our position that, quite aside from the use of tax funds to subsidize erection and maintenance of the Creche, the installation of this religious symbol on public premises constitutes governmental support of a religious doctrine which violates the requirement of governmental neutrality embodied in the Establishment Clause.

B. The Propagation of Religious Doctrine by the Government is Here Accomplished Through Installation on Public Property of a Recognized Religious Symbol.

Religious education and the propagation of religious doctrine is frequently carried out by means of recognized symbols that exemplify a particular tradition and body of ideas. These symbols through centuries of use and adoration become invested with a meaning that transcends logic. Displays of these symbols have, and are intended to have, the effect of awakening a sympathetic awareness of particular religious concepts and of intensifying particular religious attitudes. The function of religious symbolism as a means of communicating and instructing in religious precepts was noted by the Supreme Court in West Virginia State Board of Education v. Barnette, 319 U. S. 624, 632 (1943):

Symbolism is a primitive but effective way of communicating ideas. The use of an emblem ... to symbolize some system, idea, institution or personality is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to know the loyalty of their followings to a flag or banner, a color or design. The State announces rank, function, and authority through crowns and maces, uniforms and black robes; the church speaks through the Cross, the Crucifix, the altar and shrine, and clerical raiment. Symbols of State often convey political ideas just as religious symbols come to convey theological ones.

The present case involves a well-known symbol of this nature, a Nativity Scene or Creche. It can scarcely be argued that this depiction of the Virgin Birth in the stable at Bethlehem, complete with figures of the Infant Jesus, the Virgin Mary and St. Joseph, is anything other than a religious representation. It is meant to convey, and does convey, the religious message of the birth of Jesus as the Son of God. Indeed, the program of the 1968 Christmas Pageant of Peace (Government Ex. 1, Attachment A) states that the "spiritual meaning of Christmas" is offered in the form of a Nativity Scene and appellees concede that the Creche display represents the "religious heritage aspect" of the celebration of Christmas, its "spiritual meaning" (Defendants' Memorandum, pp. 2, 11, 13).

The display of religious symbols such as a Creche enables a church to speak to its adherents and strengthen their religious ties. When such a display is placed on public property, it acquires additional force. The apparent endorsement by a government of the meanings embodied in the religious symbol inescapably operates to endow those meanings with official sanction, giving an added dimension which could never be obtained through any other device. The importance of the government-sponsored display is not that more persons can perceive the symbol but rather that those who perceive it in its official setting will recognize the official sanction afforded it. Short of the absolute imposition of a particular doctrinal orthodoxy, few governmental acts could more effectively propagandize on behalf of a particular theology.

We believe that the Constitution prohibits the use of any public property for religious displays. The instant case, however, involves a very special piece of public property. The Pageant is placed directly between two symbols of the American tradition, the White House and the Washington Monument. We

venture to suggest that no other spot in the country could endow it with equal prominence or convey more effectively the message of government sponsorship.

It has been estimated that the 1968 Pageant was viewed by one-half million persons and that an additional million persons saw it on television. This Court can take judicial notice of the fact that this large exposure was primarily due to the placement of the Creche on this centrally-located piece of public property.

C. The Propagation of Religious Doctrine by the Government is Further Advanced Here by the Government's Contribution to the Expenses Entailed in Erecting and Maintaining the Creche.

The complaint alleges that the defendant Government officials and their predecessors in office have expended substantial public funds for the erection and maintenance of the Creche on the Ellipse (paragraph 4) and that the Pageant as a whole is also allowed other forms of Federal assistance such as platforms, lighting and other equipment, together with the services of Federal employees (paragraph 6). In their motion to dismiss or for summary judgment, the defendants "traverse" these allegations. The affidavit in support of this motion states that the National Park Service provides assistance to the Christmas Pageant as a whole and that the total costs for the 1968 Pageant were \$72,789.78. The affidavit further states that the same expenses would have been met even if the Creche display has not been part of the Pageant (paragraph 7).

These allegations must be taken as an admission on the part of the defendants that tax-raised funds contribute to the expenses of erecting and maintaining the Creche. Erection of a platform and a supply of lighting are an essential part of any public display.

The suggestion that the same amount would have been spent if the Creche were not included could apply equally to each other aspect of the Pageant. But that would not make the fact of Government support disappear.

Nothing can alter the fact that maintenance and erection of the Creche is financed in part by Government funds. This, we submit, is a form of assistance of religious activities that violates the concept that "No tax in any amount, large or small, can be levied to support any religious activities..." Everson case, supra, 330 U. S. at 16.

D. Placement of a Religious Symbol on Federal Property, with Federal Support, Cannot Be Legalized by Characterizing it as Part of a Celebration of a National Legal Holiday.

The Government (Defendants' Memorandum, pp. 14-15) relies on the formulation stated by the Supreme Court in the Schempp case, supra, for determining the constitutionality of a particular governmental practice under the Establishment Clause. The Court said (374 U. S. at 222):

The test may be stated as follows: What are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.

In relying on that test, the Government must show that the Christmas Pageant has a wholly secular purpose and a primary secular effect. In attempting to do so, the Government points to the increasing commercialization of Christmas, the numerous secular and pagan customs of Christmas observance, and the widespread participation of non-believers in Christmastime festivities (Defendants' Memorandum, pp. 11-13).

It is undoubtedly true that Christmas has been extensively commercialized, a fact which many Christians have publicly deplored. Today's festivities include pagan-derived elements and many non-Christians are drawn into a secularized celebration of the holiday.

It cannot be argued, however, that Christmas has been completely divorced from its religious content. If it had been, the Creche would have disappeared as a Christmas symbol.

In the court below (Defendants' Memorandum, p. 9), the Government attempted to analogize Christmas celebrations to the Sunday law which was upheld by the Supreme Court in McGowan v. Maryland, 366 U.S. 420 (1961). The Court in that case said that the Establishment Clause does not affect governmental conduct "whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions" (366 U.S. at 442). It upheld the Sunday law in question because it was designed to advance an accepted public welfare objective -- insuring that all workers have at least one day's rest in seven. This welfare objective has no analogue here.

For the Creche cannot be secularized. It has been and remains the symbol and core of the religious meaning of Christmas -- the birth of the Christian Saviour. This religious core cannot be and has not been eliminated from Christmas by the secular and pagan aspects of some celebrations of the holiday. Indeed, all religious persons, Christian and non-Christian alike, would be shocked by such a development.

It must be remembered that the plaintiffs have not challenged the Pageant concept as a whole or its support by the Government. It is only the specifically religious part that is involved here. We presume this is because the plaintiffs do not question the propriety of the use of Government property and funds to celebrate Christmas as a national holiday conveying the message of peace. However, to the extent that Government support is used to convey the "spiritual meaning of Christmas" and its "religious heritage aspect," it goes beyond what the Constitution permits Government to be involved in. It is appropriate to ask the courts to find this aspect of this governmentally sponsored operation improper.

The Constitution fully protects the right of all citizens, including the sponsors of this Pageant, to celebrate the religious aspects of Christmas

on their own property and with their own funds. It is Government involvement in such a project that is prohibited.

The Government argued below that the practice here challenged is valid because there is no "religious worship purpose" behind the inclusion of the Creche in the Pageant (Defendants' Memorandum, p. 10). This statement may be challenged in view of the Government's admission that the purpose of the Creche is to convey the "spiritual meaning of Christmas." It is thus apparent that the purpose is not wholly secular, as the Schempp test requires. In any case, regardless of the sponsors' or the Government's purpose, the effect of the display is religious and only religious. This is the main thrust of a recent decision by the Oregon Supreme Court in a similar situation.

In Lowe, et al. v. City of Eugene, et al., Or. , P. 2d , decided October 1, 1969, the Oregon Supreme Court considered a challenge to the erection of a cross on the top of a hill in a public park in the City of Eugene, Oregon. It was claimed that the placement of the cross in a public park, even at no expense to the city, violated the state and Federal constitutional provisions requiring separation of church and state. In its first decision of the case, the court, voting 4 to 3, rejected this challenge. 87 Or. Adv. Sh. 1059, 451 P. 2d 117 (decided February 26, 1969). On re-argument, however, the court reversed itself and upheld the complaint by a vote of 5 to 2.

* The opinion on rehearing is devoted primarily to procedural questions. On the merits, the court merely adopted the dissenting opinion in the original decision. The conclusion that the placing of the cross violated both the Federal and state Constitutions appears in that dissenting opinion. 87 Or. Adv. Sh. at , 451 P. 2d at 124.

The Eugene cross, unlike the Creche here, had been erected without any expenditure of public funds. Furthermore, it was argued, and the original majority opinion agreed, that the purpose of erecting the cross was not religious. 87 Or. Adv. Sh. at , 451 P. 2d at 122. Nevertheless, the court concluded that its placement in a public park was inconsistent with the obligations imposed on Government by the separation principle.

There are, of course, differences between the fact situations in the Lowe and instant cases. For example, the display in Lowe was permanent, whereas here, the Creche is put up and taken down each year. On the other hand, in the case of the cross it could be and was argued that it had sectarian as well as secular significance. Indeed, the Judge who wrote the opinion which prevailed in the first decision said (87 Or. Adv. Sh. at , 451 P. 2d at 122):

The evidence indicates that to many people the cross, whether it is a Latin cross or some other type, carries connotations that are not essentially religious in character and to such people it has primarily secular meanings.

No such claim can be made about a Nativity Scene. Its significance is religious and only religious.

E. The Practice Here Challenged Cannot be Justified on the Basis of the De Minimis Maxim.

Stressing its view that only a small amount of governmental money, land and time is involved in the Creche display, the Government seeks application to this case of the maxim, de minimis non curat lex. We challenge its assumption, based on purely material considerations, that the Government's participation here is minimal. As we have argued above, the governmental endorsement of the display has an impact independent of the amount of money, land or time involved. In any case, however, if the use of public funds or public property in support of religion is wrong, it does not become right because it is done modestly or intermittently. It makes no difference,

therefore, that the display of a religious symbol is only of seasonal duration, that it is only part of a larger Government-supported operation or that the Government resources actually used are not extensive.

The rule of de minimis is essentially a rule of convenience. It may be employed appropriately when the monetary loss suffered by a taxpayer or other plaintiff is too insignificant to warrant invoking the judicial process to obtain redress. However, different considerations apply when the right sought to be vindicated is religious rather than economic. When the Federal Government makes any appropriation, no matter how slight, for religious purposes, religion has come "within the cognizance of Civil Government." Madison, Memorial and Remonstrance Against Religious Assessments, supra. In this connection, Madison warned (par. 3):

Who does not see that the same authority which can establish Christianity in exclusion of all other religions, may establish with the same ease any particular sect of Christians, in exclusion of all other sects? That the same authority which can force a citizen to contribute three-pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?

The Supreme Court has repeatedly declared that even relatively minor encroachments upon the First Amendment must be zealously opposed. In the Everson case, supra, in an extensive discussion of the latitude of the Establishment Clause, it said (330 U. S. at 16): "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach." In Engel v. Vitale, 370 U. S. 421 (1962), the Court acknowledged that governmental endorsement of a short, "non-sectarian" prayer seemed relatively insignificant when compared to the governmental encroachments upon religion which

were commonplace two hundred years ago. However, said the Court rejecting the de minimis argument (at 436):

To those who may subscribe to the view that because the Regents' official prayer is so brief and general there can be no danger to religious freedom in its governmental establishment ... it may be appropriate to say in the words of James Madison, the author of the First Amendment: "I/t is proper to take alarm at the first experiment on our liberties..."

Again, in the Schempp case, supra, the Court declared (374 U. S. at 225): "... it is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent ..."

On this point, the Court in the Lowe case, supra, said (87 Or. Adv. Sh. at , 451 P. 2d at 124):

Finally, I do not believe the difficult constitutional question is one that can be evaded by trivialization. The cross does not occupy a large tract of land, but it is permanent and it is conspicuous. Whether so intended by the city council or not, the city's participation in the display has placed the city officially and visibly on record in support of those who sought government sponsorship for their religious display.

This, we submit, is the meat of the matter. The annual erection of a Nativity Scene on the Ellipse places the Federal Government "officially and visibly" in support of a particular sectarian religious expression. The purpose and effect of the Establishment Clause of the First Amendment is to prevent such involvement of the Government in religion.



CONCLUSION

It is respectfully submitted that the decision below should be reversed with directions to deny the motions to dismiss and for summary judgment.

Respectfully submitted,

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